CASE NO. 92-1840

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
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PATRICIA TORVIK,

and

STEPHANIE TUBBS JONES,

Petitioners,

vs.

MICHAEL G. LEVINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Nos. 92-3625/3712

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHAEL G. LEVINE,	)	
Petitioner-Appellee,	)	
v.	)	ON APPEAL from the United States District Court for the Southern District of Ohio
PATRICIA TORVIK,	)	
Respondent-Appellant,	)	
STEPHANIE TUBBS JONES,	)	
Intervenor-Appellant.	)	

Decided and Filed March 1, 1993

Before: **GUY** and **RYAN,** Circuit Judges; and **CHURCHILL,** Senior District Judge.*

RYAN, Circuit Judge. Respondent Patricia Torvik, Superintendent of the Dayton, Ohio, Forensic Center, and intervenor Stephanie Tubbs Jones, the Cuyahoga County, Ohio, Prosecuting Attorney, appeal from the district court's decision to issue a conditional writ of habeas corpus directing that Michael G. Levine be released from the custody of the forensic center. They also appeal from the district court's order staying future state court proceedings in connection with Levine. The two appeals, which have been consolidated, present a number of issues. For the reasons

* The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

discussed below, however, we conclude that both the conditional writ of habeas corpus and the stay were properly entered, and we shall, therefore, affirm.[1]

I.

On September 26, 1979, Michael Levine was found not guilty by reason of insanity, following an Ohio state court prosecution, on charges of aggravated burglary, extortion, kidnapping, attempted murder, and aggravated murder. He was committed to the custody of the Ohio Department of Mental Health.

Levine has a history of mental illness dating back to 1966. At that time, he was arrested for forging checks and briefly admitted to a psychiatric hospital, where he was diagnosed as "schizophrenic reaction, schizo-affective type, associated with depression, severe, improved." He began seeing a psychiatrist, Dr. Levendula, in 1973, and at one point was rehospitalized. He was diagnosed then as "manic depressive psychosis, explosive personality." During his psychotherapy with Dr. Levendula, Levine threatened to kill the doctor and his family, and told the doctor that he desired to kill an unnamed 25-year-old woman. Nonetheless, in 1979, about a week prior to the crimes for which Levine is now committed, Dr. Levendula was becoming convinced that he had achieved a "therapeutic triumph" because Levine's condition seemed so much improved. Levine was behaving very calmly in therapy, and had agreed to grant his then-wife a separation.

Unfortunately, Dr. Levendula's "therapeutic triumph" was illusory. Levine and an accomplice kidnapped Julius and Georgene Kravitz, a prominent Cleveland couple, with the intention of extorting money for a business venture. During the course of the crime, Levine shot both of the Kravitzes; Julius Kravitz died, while Georgene Kravitz managed to escape.

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[1] We shall, for the sake of convenience, refer to the Respondent and the Intervenor, collectively, as "Ohio" or "the state."

A bench trial was held before the Cuyahoga County Court of Common Pleas, where Levine was found not guilty by reason of insanity. The expert witness testimony at trial focused on Levine's lack of remorse for his crimes, and emphasized that Levine would function much better in an institutionalized, structured surrounding than in the unstructured "real world." After trial, Levine was hospitalized. During this period, he wrote a series of letters to his now ex-wife containing vicious threats of harm, including thinly disguised threats to kill her. The last of these letters was written in February 1980.

During his commitment, Levine received medication only briefly; he has been without medication for almost twelve years. He has also been largely without psychotherapy during this time.

Ohio statutes provide that a person found not guilty by reason of insanity is entitled to periodic hearings:

> The court shall hold a full hearing on applications for continued commitment at the expiration of the first ninety-day period and at least every two years after the expiration of the first ninety-day period . . . If the court, after a hearing for continued commitment finds *clear and convincing evidence that the respondent is a mentally ill person* subject to hospitalization by court order, the court may order continued commitment . . . .

Ohio Rev. Code Ann. §5122.15(H) (emphasis added). Ohio statutes define "mental illness" and "mentally ill person subject to hospitalization" as follows:

> "Mental illness" means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life.

Ohio Rev. Code Ann. §5122.01(A).

> "Mentally ill person subject to hospitalization by court order" means a mentally ill person who, because of his illness . . . [r]epresents a substantial risk of physical harm to others as manifested by evidence of *recent homicidal or other violent behavior,* evidence of *recent threats* that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of *present dangerousness* . . . .

Ohio Rev. Code Ann. §5122.01(B) (emphases added). In other words, a person must be *both* mentally ill *and* presently dangerous in order to be hospitalized.

Levine underwent commitment hearings to assess his condition in November 1979; April 1980; November 1980; and January and February 1982. Each time, his request for release was denied, but Levine did not appeal. In September 1983, the Dayton Mental Health Center (DMHC) notified the state trial court that Levine no longer required hospitalization. A hearing was held in December 1983. The presiding judge concluded that Levine was still mentally ill, although in remission, and subject to hospitalization under Ohio law. Levine appealed the trial court's decision. The Ohio Court of Appeals affirmed in October 1984. Levine then appealed to the Ohio Supreme Court, which, in December 1984, dismissed the appeal for lack of a substantial constitutional question.

Levine filed a petition for writ of habeas corpus in federal court in June 1985. While the petition was pending, Levine waived the periodic state hearings to which he was entitled. A magistrate judge concluded in 1988 that there had been sufficient evidence presented for the state trial court to conclude that Levine was a mentally ill person subject to hospitalization by court order, but that there had not been enough evidence to order him confined to a maximum security facility. The magistrate judge's decision was appealed to this court and we vacated his decision on the grounds that the magistrate judge had been without jurisdiction because consent was improperly urged upon

the parties under 28 U.S.C. §636(c). On remand in July 1988, the magistrate judge recommended that the district court adopt the magistrate's earlier decision as the district court's findings of fact and conclusions of law.

A week after that recommendation, Levine's counsel informed the district court that the state trial court had conducted a new commitment hearing at the beginning of July 1988, and had again recommitted Levine to the forensic center. The magistrate judge therefore withdrew his earlier recommendation, and eventually concluded that the constitutional issues presented by the 1983 commitment had been mooted by the 1988 recommitment.

Levine began again with the process of exhausting his state court remedies, now as to the 1988 recommitment. The trial court's decision was affirmed in the state court of appeals, and the Ohio Supreme Court again denied Levine's motion to appeal. In June 1990, following Levine's new petition in the district court for a writ of habeas corpus, the magistrate judge recommended that the district court issue a writ ordering a conditional discharge, this time finding that there was insufficient evidence in 1988 to conclude that Levine was mentally ill. He reasoned as follows:

> [In 1988,] all of the mental health professionals, including the treating professionals, concluded Mr. Levine was not presently mentally ill. For this Court to conclude, in the face of that testimony, that there is evidence from which a reasonable trier of fact could conclude to a clear and convincing degree that Mr. Levine is mentally ill and subject to hospitalization by court order would be to deny any impact to the Due Process Clause in this case.

The district court "concur[red] with the Magistrate Judge's conclusion that Levine is being confined in violation of the Constitution of the United States, and that he should be

granted an immediate release subject to [certain] conditions . . ."[2] In an order dated June 25, 1992, the district court issued its final decision: that Levine be released within 96 hours. Upon motion by the state of Ohio, this court granted a stay of the writ.

The district court then learned that the state trial court had again directed, without giving notice to Levine or his attorney, that a new confinement hearing be held. In order that the issues surrounding the 1988 confinement hearing not be mooted (as had happened with the 1983 issues), the district court stayed the state court proceedings, pending resolution of this appeal.

The issues raised in this appeal can be divided into two categories. The first assignments of error we discuss challenge the district court's grant of habeas relief based on Levine's due process claim, while the remainder are

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[2] The conditions, recommended by Dr. Rizk, a consulting psychiatrist for the Cuyahoga County Court of Common Pleas, as stated by the district court, are:

> 1. The defendant should reside in a different county, away from the victim's family;
>
> 2. Follow-up once every two weeks at a community mental health center or by a private psychiatrist or psychologist;
>
> 3. The court must be notified within 24 hours in case of the defendant's failure to attend his appointments without an excuse;
>
> 4. The community mental health center, private psychiatrist or psychologist should be required to write to the court progress reports about the defendant's condition once every six months;
>
> 5. In case of any signs of deterioration in the mental condition of the defendant, immediate rehospitalization should be pursued and the court informed within 24 hours.

concerned with the district court's stay of the state court proceedings.

II.
A.

The state contends that the district court erred in concluding that there was insufficient evidence adduced at the 1988 hearing to support Levine's continued commitment.[3] This court applies a *de novo* standard of review to the district court's decision in a habeas corpus case. *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir. 1990) (per curiam). We review the factual findings of the district court under a clearly erroneous standard, *Bose Corp v. Consumers Union of United States Inc.*, 466 U.S. 485, 497-501 (1984), and give complete deference to state court findings unless they are clearly erroneous. *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam).

Levine's constitutional claim is that although there was no defect in Ohio's procedures for determining whether he should be released, the trial court failed to properly apply those procedures. As a result, Levine argues, he was recommitted despite a complete absence of evidence justifying recommital, and he was therefore denied due process of law as guaranteed by the Fourteenth Amendment. This type of due process claim was considered by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979):

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[3] We reject the state's argument that since the district court's release order was only conditional, the district judge must have considered Levine to be mentally ill, because under Ohio law, a conditional release order requires a finding of mental illness. (Otherwise, the committed individual is released unconditionally.) However, the fact that the district court included conditions for Levine's release in its grant of habeas relief does not mean that it was acting pursuant to Ohio law, and finding Levine to be mentally ill. Instead, the district court was imposing conditions pursuant to its broad discretion to fashion a habeas writ. *Hilton v. Braunskill*, 481 U.S. 770 (1987). Furthermore, the district court explicitly found that Levine was not mentally ill. The government's argument is therefore without merit.

> [A] person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. . . . [T]he most elemental of due process rights [is] freedom from a wholly arbitrary deprivation of liberty.

Id. at 314 (citation omitted). *Jackson* stated the constitutional standard for reviewing the sufficiency of the evidence: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements"[4] of the relevant determination to be made. *Id.* at 319.

Foucha v. Louisiana, ___ U.S. ___ , 112 S. Ct. 1780 (1992), is the most recent Supreme Court statement concerning the kind of determination to be made here. There, the Court held that an insanity acquittee "may be held as long as he is both mentally ill and dangerous, but no longer." *Id.* at 1784. The potential for future danger cannot justify indefinite commitment in the case of an insanity acquittee who is no longer mentally ill, any more than the possibility that a convicted criminal will commit future crimes can alone justify his confinement. *Id.* at 1784 n.4. Ohio law, by defining a mentally ill person subject to hospitalization as one who is mentally ill and who presents a danger to himself or others, is in accord with this constitutional standard.

In re Burton, 11 Ohio St. 3d 147 (1984), is the leading Ohio case interpreting the state's law on the subject. The defendant there was a mental patient whose mental illness was in a state of remission as a result of psychotropic medicine. The court interpreted Ohio statutes regarding court-ordered hospitalization to mean that

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[4] As discussed below, there is a controversy over the appropriate burden of proof to be applied here. *Jackson*, which considered a criminal conviction, applied a "beyond a reasonable doubt" standard, which neither party suggests should be used. Otherwise, though, the reasoning of *Jackson* applies here, although the adjudication at issue here is not a criminal prosecution.

> a person subject to hospitalization must represent a substantial risk of physical harm to himself or other members of society at the time of the commitment hearing. *The individual's present mental state must be evaluated upon current or recent behavior as well as prior dangerous propensities* of the person. The General Assembly has . . . provided the trial court with broad discretion to review the individual's past history in order to make a well-informed determination of his present mental condition.

Id. at 149 (emphasis added). A court should apply a "totality of the circumstances" test in making this determination, considering:

> (1) whether, in the court's view, the individual currently represents a substantial risk of physical harm to himself or other members of society; (2) psychiatric and medical testimony as to the present mental and physical condition of the alleged incompetent; (3) whether the person has insight into his condition so that he will continue treatment as prescribed or seek professional assistance if needed; (4) the grounds upon which the state relies for the proposed commitment; (5) any past history which is relevant to establish the individual's degree of conformity to the laws, rules, regulations and values of society; and (6) if there is evidence that the person's mental illness is in a state of remission, the court must also consider the medically suggested cause and degree of the remission and the probability that the individual will continue treatment to maintain the remissive state of his illness should he be released from commitment. The trial court is not limited to considering any of the above factors. The court may, in its discretion, consider other relevant evidence. . . .

Id. at 149-50.

The state contends that Dr. Rizk testified that Levine is mentally ill. We disagree with this narrow interpretation of his testimony. He in fact testified that Levine showed no signs or symptoms of mental illness:

> [Counsel for the state]: Now, in your field, when you put a label of, and maybe for want of a better word, label of remission on an individual, that still notes that they still have that condition; correct, whether it is active or inactive or in remission?
>
> [Dr. Rizk]: In remission means, to me, that somebody suffered from an active illness at one point in time, and at the present time, *he is not showing the signs and symptoms of that specific illness, or showing very little of it.*
>
> [Counsel for the state]: Doctor, after you examined Mr. Levine, did you have an opinion as to his current mental status?
>
> [Dr. Rizk]: Yes, I did . . . . What I wrote in my report actually is that, major affective disorder, bipolar, depressed, *in full remission.*

(Emphasis added). Furthermore, *all* eleven expert witnesses testified that Levine was not currently displaying any signs or symptoms of active mental illness and that he had shown no such signs since at least 1982. We note that, according to Dr. Rizk, this diagnosis of a mood disorder in full remission will remain with Levine for life; in other words, no matter how well he behaves in the future, no behavior can ever produce a more favorable diagnosis.

The state also contends that the testimony of Drs. Rizk, Pasha, and Bertschinger supports the conclusion that Levine was dangerous. Again, we disagree. All of these expert witnesses were of the opinion that Levine should not be hospitalized, but they were reluctant to predict his future dangerousness because, in their view, such predictions are unreliable. However, none of them were of the opinion,

implicitly or explicitly, that Levine was dangerous in 1988. Further, there is nothing in the hearing record to indicate that Levine has made any recent threats or engaged in any recent violent behavior; in fact, the uncontradicted testimony was that Levine has shown no signs of dangerousness since 1982.

In finding, in 1988, that Levine was mentally ill and dangerous, the state court first focused on testimony the court had received at Levine's criminal trial in 1979: "[t]he evidence was abundantly clear that [Levine] suffered chronic illness [schizophrenia] for which there was no cure." Stating that "past history is crucial," the judge went on to reject the testimony of each of the expert witnesses, concluding as follows:

> Given the fact that psychosis is an illness for which there is no known cure, I find that the perhaps well meaning doctoral diagnosis of remission and recommendation of conditional release to be in error. Or, stated in a more legal sense, the testimony not to be credible.

It is true that, under Ohio standards as set out in *In re Burton*, it is perfectly permissible for the trial court to consider evidence of past behavior in assessing an insanity acquittee's present mental status. However, as this principle was applied by the state of Ohio, it amounts to an irrebuttable presumption that Levine can *never* be released. In applying Ohio's definition of "mental illness" to any particular case, medical testimony is obviously of singular importance, because it is ordinarily through the testimony of medical professionals that a court can best understand whether an individual has the "substantial disorder of thought" that is required for a finding of "mental illness" under Ohio Rev. Code Ann. §5122.01(A). This is not to say that nonmedical testimony is worthless; but for the trial court to disregard *all* the 1988 medical testimony as unworthy of credence in favor of the lay testimony concerning Levine's past heinous acts, and thereby to conclude he is still mentally ill, does not meet Ohio's statutory standards as explained by Ohio's courts.

If it were sufficient for the state merely to demonstrate that Levine was mentally ill at the time he was found not guilty by reason of insanity, it would be pointless for the state to mandate hearings at two-year intervals to determine whether a committed individual should be released.

We conclude that no evidence was adduced in the 1988 hearings that would allow a rational trier of fact to find the elements of mental illness and dangerousness as defined in Ohio statutes and case law. We see no alternative but to conclude that there was constitutionally insufficient evidence to support the state court's recommitment of Levine.

B.

The state suggests that in reaching this same conclusion, the district court improperly failed to accord adequate deference to earlier state court findings of fact. Despite *de novo* review of the petition for habeas corpus, this court does give complete deference to evidence-supported state court findings. *Lundy v. Campbell*, 888 F.2d 467, 469-70 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990). The district court, and this court, should presume that state trial or appellate court findings of fact are correct unless it is shown by convincing evidence that they are not. *See Sumner*, 455 U.S. at 597; *see also* 28 U.S.C. §2254(d). However, this presumption applies only to basic, primary or historical facts, and not to mixed questions of law and fact. *See Smith v. Jago*, 888 F.2d 399, 407-08 (6th Cir. 1989), *cert. denied*, 495 U.S. 961 (1990).

A number of courts have held that the question of mental competency is a mixed question of law and fact. *See, e.g., Dixon v. Jacobs*, 427 F.2d 589, 595 n.17 (D.C. Cir. 1970); *see also Drope v. Missouri*, 420 U.S. 162, 174-75 (1975); *Card v. Singletary*, 963 F.2d 1440, 1443-44 (11th Cir. 1992). We agree. Because the state court's determination that Levine was mentally ill and dangerous was a mixed question of fact and law, it is not entitled to section 2254(d)'s presumption of correctness. Moreover, in concluding that there is insufficient evidence to justify the recommittal of Levine,

neither the district court nor this court has improperly rejected any findings of fact by the state court. We have not substituted our judgment on the credibility of the witnesses, or reweighed the evidence, or favored one expert's testimony over another in reaching the conclusion we do — because there is simply no evidence whatever in the record to support the state court's conclusion in 1988 that Levine was mentally ill and dangerous. The state judge based his conclusion that Levine was mentally ill and dangerous on the fact that he was once diagnosed as having schizophrenia, an incurable disease. His decision that the expert testimony was not "credible" was not a true credibility determination. Instead, it was the out-and-out rejection of unanimous expert opinion solely because it conflicted with the court's long held opinion that Levine was mentally ill and that "psychosis is an illness for which there is no known cure." A determination of that kind is not entitled to a presumption of correctness.

C.

There is a question of the appropriate burden of proof to be applied by the federal court upon a habeas hearing, in the determination that the evidence is insufficient to Levine's recommitment. Ohio statutes provide that once a person is found not guilty by reason of insanity and is committed to an institution, that person is entitled to biannual hearings at which it must be shown by clear and convincing evidence that he is still mentally ill and subject to hospitalization by court order. Ohio Rev. Code Ann. §5122.15(H). The district court concluded that it should apply the clear and convincing standard mandated by state law in determining whether the state court's finding comported with due process, but noted that the standard was really a moot question since, by *any* standard, there would be insufficient evidence.

The state claims that *Jones v. United States*, 463 U.S. 354 (1983), mandates that this court review the evidence using a preponderance of the evidence standard. In *Jones*, the Supreme Court held that the standards of the District of

Columbia Code relating to the initial commitment of a person found not guilty by reason of insanity were constitutionally permissible. It concluded that the "preponderance of the evidence standard comports with due process for commitment of insanity acquittees." *Id.* at 368.

We believe, however, that *Jones* does not prescribe the standard for our case. The *Jones* Court alluded to the wide variety of approaches in the various states for committing insantiy acquittees; some jurisdictions provide automatic commitment, while others use civil commitment procedures, while others have unique standards. *Id.* at 370 n.20. The Court did not indicate that any of these procedures were constitutionally suspect, and did not adopt any particular commitment procedures or burden of proof as being the constitutionally-mandated measure. Further, *Jones* spoke only to the initial commitment following acquittal, as opposed to *release* following commitment. It is this latter circumstance that is at issue in this case, and the *Jones* court specifically declined "to decide whether the District's procedures for release are constitutional." *Id.* at 363 n.11. *Jones* does not, therefore, provide clear authority for what the constitutionally required burden of proof is in a habeas proceeding of this nature.[5]

Nonetheless, we also disagree with the district court's conclusion that the state of Ohio created a liberty interest assuring that insanity acquittees may not be recommitted on a showing of less than clear and convincing evidence. A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable. *See Engle v. Isaac*, 456 U.S. 107 (1982). In a habeas case, the federal court inquiry should be whether the state's procedures have passed federal constitutional

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[5] We note, moreover, what the parties to this appeal apparently failed to recognize: in *Jones*, the burden was on the committed individual to prove sanity, rather than on the state to prove mental illness. No one has suggested here that the burden should be on anyone other than the state.

muster, not whether there was an error in the state's applying its own law. In other words, the constitutional issue is whether the state court's application of its constitutionally adequate standard was so erroneous as to raise an independent due process violation. *See Maglaya v. Buckhoe*, 515 F.2d 265, 268 (6th Cir. 1975). Therefore, the state procedural "clear and convincing" standard is not constitutionally mandated for Levine's case.

We conclude that this court should review the evidence presented to the state court at the 1988 hearing to determine whether any rational trier of fact could have found by a preponderance of the evidence that Levine was mentally ill and dangerous.[6] As we have already made clear, the state failed to meet this standard, and Levine's recommitment is not supported by sufficient evidence.

D.

The next question is whether Levine waived habeas corpus review of his constitutional claim of insufficient evidence by failing to fairly present the claim to the state courts. In petitioning for a writ of habeas corpus under 28 U.S.C. §2254, a state prisoner must first fairly present his claim to the state courts to provide them with an opportunity to remedy any constitutional infirmity in the conviction. *Riggins v. McMackin*, 935 F.2d 790, 792-93 (6th Cir. 1991). If a petitioner fails to present his claims to the state courts and is thus barred from pursuing relief in those courts, he will not be allowed to present his claims in federal court unless he can show cause to excuse his failure and actual prejudice to his defense at trial or on appeal. *Wainwright v. Sykes*, 433 U.S. 72, 77-91 (1977). A petitioner "fairly presents" his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions

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[6] We emphasize, however, that we do not reach this conclusion because of *Jones*, which neither purports to set a constitutionally required standard, nor speaks to the precise set of circumstances before us.

employing constitutional analysis in similar fact patterns. *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987).

The state contends that Levine did not raise his constitutional claim at the state court level, and that he was therefore barred from presenting it at the appellate level. In Ohio, an appellate court may, in its discretion, refuse to consider a claim that might have been called to the trial court's attention but was not raised until the appeal. *See State v. 1981 Dodge Ram Van*, 36 Ohio St. 3d 168, 170 (1988). An alleged procedural default becomes a bar to habeas corpus review of a federal claim only if the last state court to review the claim has clearly and expressly based its decision on the claimed procedural default. The procedural default must be independent of the federal question and adequate on its own to support the state's decision. *Coleman v. Thompson*, ___ U.S. ___ , 111 S. Ct. 2546, 2557 (1991). There is a presumption that there is no procedural default (and thus no adequate and independent state ground for a state court decision) if the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of [the] state law ground is not clear from the face of the opinion." *Id.* (Citation omitted).

Our review of the record reveals that Levine did present his constitutional claim to the state appellate court, and that the court of appeals disposed of his claim on the merits. Levine's first assignment of error to the court of appeals was that the state trial court judgment was based on insufficient evidence under state law. The second assignment of error was that if, in the alternative, the evidence was sufficient under Ohio law, then Ohio law must be unconstitutional. Within that assignment of error, the petitioner raised the due process argument raised here: that due process prohibits confinement of a person found not guilty by reason of insanity when that person is no longer mentally ill and dangerous, and that the evidence before the trial court could not have rationally led it to that conclusion. Therefore, Levine framed the sufficiency of the evidence argument as a constitutional issue.

We must next consider, then, whether the state court of appeals disposed of the constitutional claim solely on the grounds of the state procedural bar.[7] If it did, federal habeas review would be barred. We are satisfied, however, that the state court of appeals disposed of the petitioner's federal constitutional claims substantively, based on federal constitutional law, by reasoning as follows:

> The defendant, in his second assignment of error, raises various claims challenging the constitutionality of Ohio's statutory commitment scheme as applied in this case. Our review of the record dicloses that the defendant has waived these claims since he failed to raise them with the trial court. . . . *Furthermore, this court in substance addressed and overruled these claims in the defendant's prior appeal . . . . Accordingly, we overrule the defendant's second assignment of error* and affirm his recommitment to the Dayton Mental Health Center.

(Citations omitted) (emphasis added.)[8] The "furthermore" language employed by the court makes it clear that the state procedural bar was not the "independent state ground" for the holding, but rather, that the court was relying on the rationale it employed in 1983 for its dismissal of Levine's second assignment of error in 1988. And the 1983 decision unquestionably rested on federal constitutional law, citing the Fourteenth Amendment; Jones, 463 U.S. at 354; and *Robinson v. California*, 370 U.S. 660 (1962), in support of the court's reasoning.

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[7] We note that, as Levine's counsel pointed out in oral argument, the state trial court was necessarily aware of these constitutional questions at the time of the 1988 state hearing, because Levine had long before filed a petition for habeas review of the 1983 hearings, in which the same questions were raised.

[8] The state court of appeals decision is the last state court judgment for these purposes, because the state supreme court's decision was not explained. *See Ylst v. Nunnemaker*, 111 S. Ct. 2590, 2594 (1991).

We conclude that the constitutional insufficiency of the evidence claim made in Levine's habeas petition is a claim that was fairly presented to the state court. This court is, therefore, not barred from considering his constitutional claim.[9]

E.

Finally, the state protests the district court's decision to expand the record before it to include evidence of the 1992 psychiatric evaluations of Levine which, of course, was not presented to the state courts. The state contends that the expansion was not proper under Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, because the materials admitted were not relevant to the claim raised by his habeas corpus petition: whether there was constitutionally sufficient evidence presented at the *1988* hearing to recommit Levine. Moreover, the state contends that even if the evidence were relevant, the district court's decision to consider it was made too quickly, without giving the state an opportunity to respond.

Rule 7 reads in relevant part:

> (a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by inclusion of additional materials relevant to the determination of the merits of the petition.

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[9] We note, moreover, that even were we to conclude that Levine failed to fairly present his constitutional claim to the state court, we would be able to consider it now by applying the doctrine of *Murray v. Carrier*, 477 U.S. 478, 496 (1986). There, it was established that in the extraordinary case "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," a court may consider the claim even absent a showing of cause and prejudice. Id. This rare exception could be applied here, where the constitutional violation demonstrated by Levine has resulted in the confinement of one who is actually not mentally ill.

Rule 7, 18 U.S.C. foll. §2254. This court reviews a district court's decision to expand the record under Rule 7 for an abuse of discretion. *Ford v. Seabold*, 841 F.2d 677, 691 (6th Cir. 1988), *cert. denied*, 488 U.S. 928 (1988).

With regard to Levine's motion to expand the record, the district court stated:

> This Court notes that the Magistrate Judge's Report and Recommendations are based upon the medical testimony elicited at the July, 1988, confinement hearing, held almost four years ago. However, Levine has filed a Motion to Supplement the Record (Doc. #140), seeking to have this Court consider his latest psychological evaluations. Since it is imperative that this Court's decision be based upon the most up-to-date medical evidence available, Levine's Motion to Supplement the record is sustained.

The district court then devoted two paragraphs to considering the new information, which was substantially the same as the 1988 information. It concluded by adopting the Report and Recommendations of the magistrate judge in its entirety which, as the district court explicitly noted, was issued *before* the record was expanded to include the 1992 information. The court then entered judgment for Levine on his petition for writ of habeas corpus.

We agree with the state that the 1992 evidence had no relevance to the issues before the district court. Nonetheless, it is evident from the district court's judgment that to the extent the court took that information into account in rendering its decision, the effect was merely cumulative. It is quite apparent that there is more than an ample basis for the district court's judgment. Thus, although it may have been an abuse of discretion to admit this evidence, the error was harmless.

III.
A.

The state argues that the district court had no authority to grant a stay of state court proceedings simply in order to prevent the 1988 commitment order from becoming moot. We disagree. Under the Federal Habeas Corpus Act, the district court has authority to grant a stay of all state court proceedings that have the effect of defeating or impairing the federal court's jurisdiction. The Act provides that

> [a] justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceedings.

28 U.S.C. §2251.[1]

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court emphasized "the fundamental policy against federal interference with state criminal prosecutions." *Id.* at 46. As explained in *Perez v. Ledesmam* 401 U.S. 82 (1971),

> [o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances

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[1] The state also appears to suggest that the government's appeal, on June 26, of th district court's issuance of the writ of habeas corpus served to divest the district court of jurisdiction. We note, however, that the district court retained jurisdiction over matters "in aid of the appeal." *Jankovich v. Bowen*, 868 F.2d 867, 871 (6th Cir. 1989). Staying the state court proceedings was necessary to perserve the status quo set by this court (namely, the stay of the issued writ) and so was clearly a matter "in aid of the appeal" that the district court had jurisdiction to order.

> where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.

Id. at 85. The district court utilized a three-step test to determine whether the stay was appropriate, analyzing: 1) whether substantial claims are set forth in the petition; 2) whether there is a demonstrated likelihood that the petition will prevail; and 3) whether there are extraordinary circumstances attending the petitioner's situation that would require the grant in order to make the writ of habeas corpus effective. *Cf. Bundy v. Wainwright*, 808 F.2d 1410, 1421 (11th Cir. 1987); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982). It found that the first two prongs of the test were already met, since it had already granted Levine's habeas petition. It found extraordinary circumstances existed because

> the state court trial judge has scheduled a commitment hearing that has absolutely no legal possibility of making valid or constitutional, after the fact, a confinement which this Court has determined to be invalid of [sic] unconstitutional .... [W]hile this Court's Order remains unreversed and unvacated, the state court has no legal foundation or authority to confine Levine for the purpose of further mental evaluations or a further confinement hearing.

(Footnote omitted). The district court further noted that if a confinement hearing were to be held, the hearing would render the 1988 confinement order moot before the constitutionality of that order can be determined in federal court. This would result in dragging "Levine into a Kafkaesque cycle of proceedings from which there is no escape...." The court noted that this " 'twilight zone' scenario is not a mere hypothetical possibility [since a] new confinement order, issued . . . in 1988, has already served to moot a previous decision of this Court's Magistrate which ordered Levine's release." We think it is plain that the district court's careful analysis led it to the correct conclusion. We find no merit in the state's argument.

B.

The state next argues that the district court abused its discretion in staying the state court proceedings because it gave the state inadequate time to respond to the motion. Counsel for the state received the motion on the afternoon of Thursday, July 2, 1992. The district court issued the stay on the morning of Tuesday, July 7, 1992. The intervening time included a three-day holiday weekend. Therefore, the state claims, it had inadequate time to respond. Furthermore, it argues, there was no justification for expediting the order, because the state court was not close to making a ruling on Levine's further commitment.

The local rules of the Southern District of Ohio permit twenty-one days in which to file a memorandum in opposition to a motion, but also allow a court to afford "an early hearing on any motion with or without the filing of memoranda by the parties." S.D. Ohio R. 7.2(a)(2), 7.1(a)(3). This local rule is analogous to Fed. R. Civ. P. 6(d), requiring that a motion be served at least five days before it is decided by the court, although the local rule trumps Rule 6(d)'s notice provisions. *Rose Barge Line, Inc. v. Hicks*, 421 F.2d 163, 164 (8th Cir. 1970). Application of Rule 6(d) has been reviewed under the abuse of discretion standard, and a court may shorten the period of notice for good cause shown. *In re Grand Jury*, 524 F.2d 209 (10th Cir. 1975), *cert. dismissed*, 425 U.S. 927 (1976); *United States v. Taulbee*, 476 F.2d 804 (9th Cir. 1973); *Herron v. Herron*, 255 F.2d 589 (5th Cir. 1958).

In its order granting the stay, the district court wrote:

> Unbeknownst to this Court, . . . the Cuyahoga County Common Pleas Court had issued an order on June 29, 1992, without notice to Levine or his counsel, directing state authorities to transport Levine from the DMHC to Cuyahoga County for a hearing on continued confinement. Although counsel for Levine and for Respondent Torvik had agreed that Levine's confinement hearing would be postponed pending the outcome of federal

> litigation, [the Ohio court] set a hearing for July 1, 1992. . . . Levine has now asked this Court to issue an order staying further proceedings in state court . . . pending resolution of Torvik's appeal . . . .

(Citations and footnotes omitted.) This more than adequately explains what is extraordinary and unique about this case, and why the district court viewed the expedited decision as necessary. Thus, because the district court adequately explained its decision to expedite the order, and because in view of the circumstances,[2] five days was an objectively reasonable amount of time to respond, we find that the district court did not abuse its discretion.

C.

The state argues that the district court abused its discretion because the stay is inconsistent with its writ of habeas corpus. The state asserts that the district court's conditional writ releasing Levine expressly required the continuing supervision of the state trial court, because it required that the court 1) be notified within 24 hours in case of Levine's failure to attend this psychiatric appointments; 2) receive progress reports about Levine's condition every six months; and 3) be informed in the event of any psychological deterioration. Thus, it reasons, the stay of the state court proceedings is irreconcilable with the district court's mandate in the writ that the state trial court continue to exercise jurisdiction.

We again disagree. It is clear from the face of the stay that its purpose is to enjoin further commitment hearings that would moot Levine's current petition for writ of habeas corpus. It is equally clear that mandating that the state court be apprised of warning signals about Levine's behavior does

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[2] We note that the district court ruled on other motions in as few as three days. We conclude that the government should therefore have anticipated an expedited decision on such an important motion.

not implicate those concerns. There is, therefore, no difficulty in reconciling the two district court decisions.

IV.

For the foregoing reasons, we **AFFIRM** the district court's grant of a writ of habeas corpus conditionally releasing Michael Levine from the custody of the state of Ohio. We direct that Levine be released from custody forthwith. In so doing, however, we also direct that certain changes be made to the conditions of his release set forth by the district court. For ease of reference, we recapitulate all of those conditions, in their amended form:

> 1. The defendant shall reside in a different county than Cuyahoga, away from the victim's family;
>
> 2. The defendant shall receive follow-up once every two weeks at a community mental health center or by a private psychiatrist or clinical psychologist, with the first visit to be within 72 hours after release;
>
> 3. The Cuyahoga County Court of Common Pleas must be notified within 24 hours in case of the defendant's failure to attend his appointments without an excuse;
>
> 4. The community mental health center, private psychiatrist or clinical psychologist shall be required to send progress reports to the Cuyahoga County Court of Common Pleas detailing the defendant's condition once every six months; however, the first report should be submitted within 30 days after release; and;
>
> 5. In case of any signs of deterioration in the mental condition of the defendant, immediate rehospitalization should be pursued and the Cuyahoga County Court of Common Pleas informed within 24 hrs.

We also **AFFIRM** the district court's stay of state court proceedings.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

FILED, JUNE 25, 1992

MICHAEL G. LEVINE

JUDGEMENT IN A CIVIL CASE

v.

CUYAHOGA COUNTY COURT
OF COMMON PLEAS

Case Number: C-3-85-493

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Petitioner Michael G. Levine and against the Respondent Cuyahoga County Court of Common Pleas.

June 25, 1992
Date

Kenneth J. Murphy
Clerk

/s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED, JUNE 25, 1992

MICHAEL G. LEVINE,	:	
Petitioner,	:	
vs.	:	Case No. C-3-85-493
CUYAHOGA COUNTY COURT OF COMMON PLEAS,	:	Judge Walter Herbert Rice
Respondent.	:	

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (DOC. #121); PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (DOC. #1) AND MOTION TO ISSUE WRIT (DOC. #104) SUSTAINED, SUBJECT TO THE CONDITIONS RECOMMENDED BY DR. RIZK; RESPONDENT'S MOTION TO SUPPLEMENT RECORD (DOC. #138) SUSTAINED; PETITIONER'S MOTION TO SUPPLEMENT RECORD (DOC. #140) SUSTAINED; JUDGMENT TO BE ENTERED IN FAVOR OF THE PETITIONER AND AGAINST THE RESPONDENT; TERMINATION ENTRY

On July 31, 1991, this Court issued a Decision and Entry (Doc. #134) adopting the Report and Recommendations of the United States Magistrate Judge (Doc. #121) and conditionally authorizing the release of Petitioner Michael G. Levine, subject to the conditions recommended by Dr. Rizk. This Court has now finished reviewing the completed record and is prepared to supplement its July 31, 1991, Entry, which is both hereby incorporated by reference and attached to this Decision and Entry for purposes of providing essential background information.

This case was referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A), (B) and (C) (Doc. #85). In accordance with that section, this court has conducted a *de novo* review of those portions of the Report and Recommendations to which objection has been made. *See also Hill v. Duriron Co.*, 656 F.2d 1208, 1213 (6th Cir. 1981). Upon review, this court finds that the Magistrate Judge's Report and Recommendations are in conformity both with the facts and with the law. The Court hereby adopts the reasoning and citations of authority therein.

Since the filing of this Court's July 31, 1991, Entry, Respondent has filed a Motion to Supplement the Record (Doc. #138). While the Court will sustain that Motion, nothing contained therein affects the disposition of this case. Respondent argues that Levine may legally be confined on the basis of his prior dangerous propensities. In support of this argument, Respondent seeks to supplement the record with various items of correspondence from Levine to his former wife. Respondent further contends that Levine has shown no remorse for his actions.

This Court, however, is quite familiar with the referenced correspondence, the same having been incorporated into the record some time ago. *See* Doc. #21. Those letters were given full consideration by this Court and by the Magistrate Judge. Similarly, the testimony with which Respondent seeks to supplement the record regarding Levine's purported lack of remorse has been highlighted on numerous occasions during the course of this litigation and has been fully considered.

This Court agrees that certain statements made by Levine to his doctors and to his wife are frightening, to say the least. However, the letters were written almost a decade ago, and no medical authority has been brought forward to testify that whatever mental or emotional defect caused Levine to write those letters still exists or that the rage expressed in those letters is capable of manifesting itself upon his release from confinement.

Similarly, this Court finds the issue of remorse to be a red herring. While remorse may well be one of the presumably numerous factors which a psychiatrist or psychologist will consider in determining a patient's mental health, that issue, standing alone, is of little value to a reviewing court. First, as demonstrated by Petitioner's Response (Doc. #139), an evaluation of whether a criminal feels "remorse" for his misdeeds is highly subjective and open to debate. More importantly, there is no requirement that Levine actually feel sorry for what he did. Under the law, the proper inquiry is whether he is presently suffering from a mental illness or deficiency which poses a threat to society. This is a determination which must be based upon expert testimony. Accordingly, the question of remorse is relevant only to the extent that Levine's medical examiners find it relevant.

This Court notes that the Magistrate Judge's Report and Recommendations are based upon the medical testimony elicited at the July, 1988, confinement hearing, held almost four years ago. However, Levine has filed a Motion to Supplement the Record (Doc. #140), seeking to have this Court consider his latest psychological evaluations. Since it is imperative that this Court's decision be based upon the most up-to-date medical evidence available, Levine's Motion to Supplement the Record is sustained.

A status report on Levine's mental condition was signed by Dr. Thomas L. South on May 8, 1992. Dr. South notes that Levine has not received psychotropic medication since 1979, has been an exemplary patient, has not had a psychiatric diagnosis (has shown no signs of any kind of psychotic disorder) since his admission to the Dayton Forensic Unit in 1983 and has not exhibited any behavior which suggests that he is a danger to himself or to others. Since Levine has shown no evidence of mental illness in the past nine years, Dr. South recommends his release into the community.

On May 13, 1992, a panel consisting of Dr. Massimo De Marchis, Dr. Salah M. Samy and Dr. Vinod Dhar was convened in order to review Dr. South's report and to independently

evaluate Levine. The panel unanimously agreed with Dr. South's assessment which indicated that Levine does not presently suffer from a mental disorder as defined in Ohio Rev. Code § 5122.01(A) and concluded that Levine should be released into the community. The panel found no evidence that Levine constitutes a danger to himself or to others (either as a result of a mental disorder or as a result of mere antisocial behavior).

If there were previously any question as to this Court's absolute duty under the Constitution, all such doubts have been dispelled by the United States Supreme Court's recent pronouncement in *Foucha v. Louisiana*, 60 U.S.L.W. 4359 (U.S. May 18, 1992). In *Foucha*, the Court held that once an individual committed to a mental institution recovers his sanity, "the basis for holding [the individual] in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." *Id.* at 4361.

In the *Foucha* case, the Supreme Court ruled that the petitioner was entitled to release by virtue of the recovery of his sanity, despite the fact that his examining experts would not certify that he did not pose a danger to himself or to others. Here, however, four experts have opined that Levine does not pose such a threat to the community. Therefore, under the authority of *Foucha*, this Court has no option but

to order Levine released from confinement, subject to the conditions recommended by Dr. Rizk.[1]

Since announcing its preliminary decision on July 31, 1991, this Court has received 157 letters from residents of the Cleveland area, each and every one of which has implored this Court not to release Mr. Levine. This Court appreciates the sincerity of those persons who took the time and trouble to write these letters. Were this Court a layman, unschooled in the law and in the requirements which must be met by the state in order to achieve continued hospitalization of Mr. Levine, the Court might well have written such a letter himself. However, this Court has no choice in the matter, given the present state of the record. If there are those who disagree with the present state of the law, recourse must be had to the Ohio General Assembly in Columbus for relief. This Court has no choice but to follow the law as it is written and as it has been interpreted by the highest courts of both the United States and the State of Ohio. This Court must follow the law and make a decision on the basis of the evidence in the record. This is the same burden both understood and assumed by Cuyahoga County Court of Common Pleas Judge John Angelotta, upon the record, at the beginning of the proceedings on July 6, 1988, an obligation which he then proceeded to ignore by ordering

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[1] The conditions recommended by Dr. Rizk are:

1. The defendant should reside in a different county, away from the victim's family;
2. Follow up once every two weeks at a community mental health center or by a private psychiatrist or psychologist;
3. The court must be notified within 24 hours in case of the defendant's failure to attend his appointments without an excuse;
4. The community mental health center, private psychiatrist or psychologist should be required to write to the court progress reports about the defendant's condition once every six months;
5. In case of any signs of deterioration in the mental condition of the defendant, immediate rehospitalization should be pursued and the court informed within 24 hours.

the continued hospitalization of the Petitioner, not only in spite of a factual record totally devoid of evidence which would have supported such a conclusion, but also in the face of enormous and overwhelming evidence to the contrary.

Equally disturbing is the performance of the Ohio Attorney General's Office throughout the course of Mr. Levine's hospitalization. Despite arguing strenuously that Mr. Levine's mental health has not been restored, and that Mr. Levine remains a threat to society, the state has not produced, despite years of litigation, one shred of evidence to that effect. The state was well aware of the importance of Mr. Levine's July, 1988, comptency hearing, given the fact that the Magistrate Judge had previously concluded the evidence presented by the state at Mr. Levine's *1983* competency hearing was insufficient to support continued confinement. Not only did the state not take steps to cure this evidentiary deficiency in the 1988 hearing, but it relied upon the testimony of a medical expert (Dr. Rizk) whose opinion does not support the state's legal position (Dr. Rizk, who testified on behalf of the state, opined that Levine's disorders are in full remission and that Levine should be granted a conditional release from confinement).

Wherefore, based upon the above, the Report and Recommendations of the United States Magistrate Judge (Doc. #121) are adopted in their entirety. Petitioner's Petition for Writ of *Habeas Corpus* (Doc. #1) and Motion to Issue Writ (Doc. #104) are sustained, subject to the conditions recommended by Dr. Rizk. Respondent's Motion to Supplement the Record (Doc. #138) is sustained. Petitioner's Motion to Supplement the Record (Doc. #140) is sustained. Judgment will be entered in favor of Petitioner and against Respondent.

Petitioner is to be released within 96 hours, to wit: not later than 4 p.m. on Monday, June 29, 1992.

The captioned case is hereby terminated upon the docket records of the United States District Court for the Southern

District of Ohio, Western Division, at Dayton.

June 25, 1992

/s/
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies mailed to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED, JULY 31, 1991

MICHAEL G. LEVINE,	:	
Petitioner,	:	
vs.	:	Case No. C-3-85-493
CUYAHOGA COUNTY COURT OF COMMON PLEAS,	:	Judge Walter Herbert Rice
Respondents.	:	

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE (DOC. #121); PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (DOC. #1) AND MOTION TO ISSUE WRIT (DOC. #104) CONDITIONALLY SUSTAINED

On September 26, 1979, Petitioner Michael G. Levine was found not guilty of murder by reason of insanity. Since that time, he has been confined in a maximum security facility for persons acquitted by reason of insanity. Levine filed a Petition for Writ of *Habeas Corpus* (Doc. #1) on June 25, 1985. He filed a renewed Motion to Issue Writ (Doc. #104) on March 22, 1990. This case has had a long and tortuous procedural history which is well documented in the latest Report and Recommendations of the United States Magistrate Judge (Doc. #121) and in the extensive briefing of the parties. Accordingly, the procedural history will not be revisited here.

The Court has conducted a thorough review of the record, and reviewed *de novo* the portions of the Magistrate Judge's Report and Recommendations to which specific objections have been raised. The Court finds that the Report and Recommendations accurately state the facts and the law,

and same are hereby adopted in their entirety. The Court concurs with the Magistrate Judge's conclusion that Levine is being confined in violation of the Constitution of the United States, and that he should be granted an immediate release subject to the conditions recommended by Dr. Rizk. Since the Court has adopted the analysis contained in the Report and Recommendations, the Magistrate Judge's findings will not be repeated at length. The Court does, however, wish to briefly address Respondent's Objections (Doc. #123) to the Report and Recommendations.

Respondent first complains that he was not given an opportunity to file a return of writ in response to the expanded record. A review of the record, however, reveals no request by Respondent for an extension of time in which file a more comprehensive response. Nor has leave to supplement the Objections been sought by Respondent despite the fact that the Magistrate Judge's Report and Recommendations were filed over a year ago. Therefore, Respondent's protestations that he has not had an opportunity to file a more complete response are somewhat disingenuous.

Respondent next argues that Levine's procedural default bars review by this Court. While it may be true that Levine did not preserve his appeal as to the correct constitutional standard for commitment to a maximum security facility, it is clear beyond peradventure that Levine argued to the trial court that his confinement was unconstitutional in that it was based upon insufficient evidence. That argument was addressed by the court of appeals and review was denied by the Ohio Supreme Court. Since Levine has properly exhausted that constitutional claim in state court, he is not barred from presenting it to this Court.

Respondent next argues that the Magistrate Judge erred in applying the state standard of clear and convincing evidence rather than the federal constitutional standard of a preponderance of the evidence. The Court agrees with the Magistrate Judge that since Ohio has chosen to apply a clear and convincing evidence standard, it has thereby created a liberty interest in not being confined on a lesser

showing of mental illness. However, the Court would emphasize that this is a moot question; there is *no* evidence from which it could reasonably be concluded that Levine is presently insane. Even if the state is held only to the preponderance standard, it has not met that burden.

Respondent contends that the Magistrate Judge improperly failed to apply the § 2254(d) presumption of correctness to the state court findings, and substituted his own credibility findings. Section 2254(d)(8) expressly allows a federal court to reject state court factual findings which are not fairly supported by the record. While the Court agrees that the trial court had every right to reject the conclusions of Levine's experts, even the state's own expert, Dr. Rizk, found that Levine's disorders are in full remission and that he should be granted a conditional release. At the state court hearing, Respondent could not produce one single examining professional who could opine that Levine is presently insane or recommend his continued confinement. Therefore, it cannot be said that the trial court's factual findings are fairly supported by the record.

Finally, Respondent argues that there is sufficient evidence to support the trial court's conclusions. As just noted, the record is devoid of any expert opinion suggesting that Levine is currently insane or poses a threat to society. The state also presented no evidence of recent behavior such as threats, aggressive action, etc., which might suggest that Levine retains a propensity for violence. Respondent's own medical expert recommended release. There is absolutely *no evidence* which supports Levine's continued confinement.

The Court is of the opinion that Levine is being held in violation of the Constitution of the United States. The Court notes, however, that the transcript of Levine's 1988 confinement hearing has not been filed with the Court. Therefore, this Order, directing Levine's release from confinement subject to the conditions recommended by Dr. Rizk, is made conditional upon its filing. Upon receipt, the Court shall review said transcript. If the evidence therein is consistent with the characterization of the evidence by

the parties and by the state court of appeals, a final decision shall issue forthwith.

Wherefore, based upon the above, the Court hereby adopts the Report and Recommendations of the United Sates Magistrate Judge (Doc. #121) in their entirety. Petitioner's Petition For Writ of *Habeas Corpus* (Doc. #1) and renewed Motion to Issue Writ (Doc. #104) are conditionally sustained subject to the filing of the above referenced transcript, which must be filed not later than ten days following date of receipt of this entry.

/s/

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

FILED, JUNE 29, 1990

MICHAEL G. LEVINE,

Petitioner, : Civil Action No. C-3-85-493

- vs - Judge Rice
Magistrate Merz

PATRICIA TORVIK,

Respondent. :

REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

This habeas corpus action, brought pursuant to 28 U.S.C. § 2254, is before the Court upon Petitioner's Motion to Issue Writ (Doc. #104) and Judge Rice's Recommittal (Doc. #113) of the issues raised by objections to the Magistrate's prior Report and Recommendations of March 21, 1989 (Doc. #99).

PROCEDURAL HISTORY

On May 1, 1979, Michael Levine and an accomplice kidnapped Julius Kravitz, a well-known Cleveland philantropist, and his spouse. When the Kravitzes failed to produce the demanded ransom, Mr. Levine shot them both. Mr. Kravitz died the next day and Mr. Levine was indicted for kidnapping, burglary, extortion, murder, and attempted murder. After a bench trial before the Honorable John Angelotta of the Cuyahoga County Common Pleas Court, Mr. Levine was found not guilty by reason of insanity.

Under Ohio Revised Code §2945.40, an Ohio trial court which finds a defendant not guilty by reason of insanity must then "conduct a full hearing to determine whether the person

is a mentally ill person subject to hospitalization by court order" under the standards of Ohio Revised Code §5122.01. Judge Angelotta conducted such a hearing, found Mr. Levine to meet the statutory standard, and ordered that he be confined in the Lima State Hospital, then the Ohio maximum security facility for persons acquitted by reason of insanity. Mr. Levine was later transferred to the Dayton Forensic center when it replaced Lima State.

Ohio Revised Code §2945.40(E) provides that committed NGRI acquitees have the same hearing rights as to continued commitment as those civilly committed under Ohio Revised Code §5122.15(H): after the first ninety days of commitment, every one hundred eighty days thereafter upon demand, and every two years whether or not demanded. After each such hearing, which is held by the trial judge who made the original finding of not guilty by reason of insanity, continued commitment may be ordered only if the person is found, by clear and convincing evidence, to be at that time a mentally ill person subject to hospitalization by court order.[1]

Under O.R.C. §5122.15(H), Judge Angelotta held release hearings in November, 1980, and May-December, 1983. On each occasion he found Mr. Levine to be, by what he characterized as clear and convincing evidence, a mentally ill person subject to hospitalization by court order.

Mr. Levine filed his original Petition for habeas corpus in this Court on June 21, 1985. He alleged that he was confined by Respondent's predecessor in office, Roger Mendenhall, in violation of his constitutional rights in that he had been committed involuntarily either upon unconstitutionally infirm evidence or pursuant to a

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[1] "Clear and convincing evidence" is the constitutionally required burden of proof for involuntary commitment for those civilly committed. *Addington v. Texas*, 441 U.S. 418 (1979). A lesser standard of proof is constitutionally required for those charged with crimes and found not guilty be reason of insanity, *Jones v. United States*, 463 U.S. 354 (1983), but Ohio has chosen statutorily to use the civil commitment standard for those found not guilty by reason of insanity.

constitutionally infirm statute by Judge Angelotta upon the record in 1983. Mr. Levine was entitled to additional state hearings in 1985 and 1987, but waived them because of the pendency of state appellate process and this litigation.

The Magistrate, sitting with the unanimous consent of the parties, held a brief evidentiary hearing in the fall of 1987 to clarify the evidence which had been presented to Judge Angelotta in 1983. In an Opinion and Decision granting the writ of habeas corpus on March 30, 1988, (Doc. #69), the Magistrate concluded that there had been constitutionally sufficient evidence presented in 1983 for Judge Angelotta to conclude that Mr. Levine was a mentally ill person subject to hospitalization by court order, but that there had not been constitutionally sufficient evidence to order him confined in a maximum security facility. Ohio law requires that the burden of proof be satisfied on each of these points and no psychologist or psychiatrist had recommended confinement in a maximum security facility. The Magistrate granted the writ conditionally, ordering that Mr. Levine be released unless the State had granted him a hearing within sixty days to determine if he was then a mentally ill person subject to commitment by court order and ordering a "presently appropriate commitment if he is so found." (Opinion and Decision at p. 19).

On appeal, the Sixth Circuit vacated this decision on the grounds the Magistrate acted without jurisdiction, consent having been improperly urged upon the parties under 28 U.S.C. §636(c). (Order, Doc. #83). Upon remand, the matter was recommitted to the Magistrate (Doc. #85), and the Magistrate recommended on July 18, 1988, that District Judge Rice treat the Opinion and Decision as a report and recommendations and adopt them as the Court's findings of fact and conclusions of law. (Report and Recommendations, July 18, 1988, Doc. #86).

One week later, Mr. Levine's counsel advised this Court for the first time that Judge Angelotta had conducted a new commitment hearing on July 6, 7, and 11, 1988, and had again committed Mr. Levine to the Dayton Forensic Center

(Doc. #88). On the same day, the Magistrate withdrew his Report and Recommendations (Entry, Doc. #89) and ordered the parties to brief the question whether the new commitment order rendered the questions raised by the prior commitment moot (Scheduling Order, Doc. #90).

The parties briefed the mootness question; in addition, Mr. Levine moved to expand the record to include the 1988 proceedings. On March 21, 1989, the Magistrate issued a new Report and Recommendations (Doc. #99), concluding:

1. The question whether there was constitutionally sufficient evidence to support the 1983 finding that Mr. Levine was a mentally ill person subject to hospitalization by court order was moot because Mr. Levine was no longer committed as a result of that order.

2. The question whether Judge Angelotta applied the correct legal standard in determining where Mr. Levine should be confined in 1983 was not moot because it was capable of repetition yet avoiding review, since future commitment decisions regarding Mr. Levine would be made by Judge Angelotta yet the time required to complete the state appellate process might repeatedly prevent review in this Court.

3. The record should not at that time be expanded to include the 1988 proceedings since Mr. Levine had not exhausted his available state remedy of appeal from the 1988 commitment order.

Respondent objected to this Report and Recommendations (Doc. #101) and the Report was ripe on the objections at the time Mr. Levine filed his pending Motion to Issue Writ (Doc. #104) and has now been recommitted to the Magistrate for reconsideration under Fed. R. Civ. P. 72(b).

OPINION ON ISSUES PRESENTLY PRESENTED

MOOTNESS

The Magistrate adheres to his prior opinion that the issue of the constitutional sufficiency of the evidence upon which Mr. Levine was committed in 1983 is moot since Mr. Levine is no longer confined under that commitment order and it cannot legally result in his confinement or any other collateral legal consequence in the future. *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

However, the issue of the constitutionality of the standard applied to determine Mr. Levine's place of confinement in 1983 is not moot. Indeed, succeeding history proves that it was and remains capable of repetition and quite possibly evading review: since the Magistrate's Opinion in 1988, Judge Angelotta has again apparently applied the same standard to again commit Mr. Levine to a maximum security facility and the repeated application may evade review if new commitment hearings, scheduled for July, 1990, are held before the District Court reaches this case for decision.

EXPANSION OF THE RECORD AND EXHAUSTION OF STATE COURT REMEDIES

In March, 1989, the Magistrate recommended that the record not then be expanded to include the 1988 proceedings because Mr. Levine had not then exhausted his available state court remedies (Report and Recommendations, Doc. #99, pp. 6-8) and suggested that he file a "new petition" if he suffered an adverse decision in the Ohio Court of Appeals on appeal from the 1988 commitment.

Mr. Levine filed his Motion to Issue Writ after that adverse decision by the Ohio Court of Appeals but before the Ohio Supreme Court had acted on his appeal to it. The parties argued at some length over whether that further exhaustion step was required, but that argument is now moot: on June 13, 1990, the Ohio Supreme Court denied Mr. Levine's motion to appeal and dismissed his claimed appeal of right. (*State*

of Ohio v. Levine, Case No. 90-415) (Appendix MM to Doc. #119). Plainly, Mr. Levine has now exhausted all available state court remedies.

Mr. Levine seeks to expand the record in this case rather than filing a new petition. While the Magistrate recommended a new petition in the March, 1989, Report, that recommendation was based on the Magistrate's expectation that the District Court would have decided the questions raised in that Report and terminated this case before the Ohio Court of Appeals reached its decision. That turned out not to be the case, and there is no good reason to insist on the formality of a new petition. Mr. Levine's Motion to Issue Writ presents the issues raised by the 1988 proceedings with a clarity far beyond that often found in habeas corpus petitions, so there is no prejudice to the State, which has to respond to the much less clearly presented petitions of *pro se* litigants. The State has also had full opportunity to respond to Mr. Levine's arguments; it suggests no functional purpose of insisting on a new petition.

PROCEDURAL DEFAULT

Respondent asserts this Court may not reach the merits of Mr. Levine's constitutional claim because he procedurally defaulted in presenting that claim to Judge Angelotta.

Where a state court fails to address the merits of a defendant's constitutional claim because of a state procedural bar to the presentation of that claim, a federal court is likewise barred from reaching the merits in a subsequent habeas action unless the defendant's procedural failure is excused by cause and prejudice. *Wainright v. Sykes*, 433 U.S. 72 (1977).

The State claims procedural default because the Ohio Court of Appeals wrote:

> The defendant, in his second assignment of error, raises various claims challenging the constitutionality of Ohio's statutory commitment

> scheme as applied in this case. Our review of the record discloses that the defendant has waived these claims since he failed to raise them with the trial court. See *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St. 3d 168, 170. Furthermore, this court in substance addressed and overruled these claim in the defendant's prior appeal. See *State v. Levine, supra*, slip opinion at 7-9.

State of Ohio v. Levine, Case No. 56203 (Cuyahoga County, January 25, 1990), slip opinion at 27.

This ruling by the Ohio Court of Appeals does not bar this Court from reaching the merits of the issues raised in Mr. Levine's Motion to issue Writ because the Court of Appeals did reach and decide on the merits the sole constitutional issue presented here: the constitutional sufficiency of the evidence supporting the commitment order.

It is unclear what constitutional claims Mr. Levine raised in his second assignment of error in the Ohio Court of Appeals, since the brief in question has not been filed with this Court by either party and the Ohio Court of Appeals opinion does not spell out which constitutional claims it is treating as procedurally barred. However, it is clear that Mr. Levine raised in the Cuyahoga County Common Pleas Court and again on appeal the question of the constitutional sufficiency of the evidence to support his continued commitment to a maximum security facility. His first assignment of error was that "clear and convincing evidence does not support the trial court's judgment." *State of Ohio v. Levine, supra*, slip opinion at 1. It is precisely that issue which the Ohio Court of Appeals spends the first twenty-seven and one-half pages of its twenty-eight page opinion discussing. That same issue of course formed the core of Mr. Levine's initial Petition related to the 1983 commitment hearing and was central to the Magistrate's original Opinion and Decision granting the writ, an Opinion which Judge Angelotta acknowledged receiving from both the Magistrate and Mr. Levine's counsel (Doc. #118, Appendix LL). That issue is the sole issue argued in the Motion to Issue Writ (Doc.

#104). While the Court of Appeals opinion meets the express reliance test of *Harris v. Reed*, 489 U.S. ___ , 103 L. Ed. 2d 308, 317 (1989), the constitutional claims it refused to consider are not those now presented here.

THE MERITS OF PETITIONER'S CLAIM

The evidence presented to Judge Angelotta is constitutionally insufficient to permit a finding that Michael Levine was in July, 1988, a mentally ill person subject to involuntary hospitalization by court order.

In making its determination whether the evidence is constitutionally sufficient, this Court is governed by the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979):

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts.

Of course, with respect to involuntary commitment of the mentally ill, the constitutional standard is proof by clear and convincing evidence, *Addington v. Texas*, 441 U.S. 418 (1979), a standard embodied in the governing Ohio statute, Ohio Revised Code §5122.15(B). See *Sheffel v. Sulikowski*, 62 Ohio St. 2d 128, 403 N.E. 2d 993 (1980).

Moreover, the crucial question is whether a person is *presently* mentally ill. Unless a person is presently mentally ill and dangerous to others, he cannot constitutionally be committed against his will. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jones v. United States*, 463 U.S. 354 (1983).

For purposes relevant to this case, Ohio defines a mentally ill person subject to hospitalization by court order as

> [A] mentally ill person who, because of his illness:
>
> . . .
>
> (2) Represents a substantial risk of physical harm to others as manifested by evidence of *recent* homicidal or other violent behavior, evidence of *recent* threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of *present* dangerousness;

Ohio Revised Code §5122.01(B)(2). "Mental illness" is defined as "a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or inability to meet the ordinary demands of life." Ohio Revised Code §5122.01(A).

At pages 25 through 28 of the Motion to Issue Writ, Mr. Levine's counsel summarizes the evidence at the 1988 hearing which shows Mr. Levine is neither presently mentally ill nor presently dangerous as a result of mental illness:

1. Dr. Rizk, who has examined Mr. Levine many times in the last ten years, testified that Mr. Levine currently (June 24, 1988) shows no signs of a substantial disorder of thought, mood, perception, orientation, or memory, nor did he show any signs of mental illness when examined in December, 1982, December, 1983, or November, 1985. He opined that Mr. Levine's diagnosis of major affective disorder, bipolar, depressed, in full remission would remain with Mr. Levine for life, but did not mean there were any present signs or symptoms.

2. Dr. Pasha opined that Mr. Levine is not mentally ill, and recommended a discharge as early as January, 1985.

3. Dr. McIntosh, who has spent over 1,000 hours with Mr. Levine as his ward psychologist sine 1983, found no evidence

of mental disorder; his conclusions are supported by the results of three separate Minnesota Multiphasic Personality Inventories ("MMPI") given to Mr. Levine over those five years.

4. Dr. Appelbaum, a non-treating expert, examined Mr. Levine and reviewed the records. He opined that Mr. Levine had no diagnosable mental disorder.

5. Dr. Bertschinger, director of the Lake County Psychiatric Clinic, opined in 1988 that there was no mental illness.

The same expert witnesses also agreed that Mr. Levine does not represent a danger to anyone (Doc. #104, pp. 28-29).

The record is absolutely clear the Mr. Levine's remission is not the result of medication; he has had no psychotropic medication since May, 1981. Even group therapy at the Dayton Forensic Center was long ago discontinued.

As indicated in the Magistrate's initial Opinion and Decision in this case, Ohio law requires two separate findings in an involuntary commitment proceeding. Once a person has been found mentally ill and subject to hospitalization by court order, the court is to make one of the commitments provided for in Ohio Revised Code §5122.15(C). Ohio Revised Code §5122.15(E) further provides:

> (E) In determining the place to which, or the person with whom, the respondent is to be committed, the court shall consider the diagnosis, prognosis, preferences of the respondent, and projected treatment plan for the respondent and order the implemention of the least restrictive alternative available and consistent with treatment goals and, in the case of a person found not guilty by reason of insanity, with public safety. If the court determines that the least restrictive alternative available that is consistent with treatment is inpatient hospitalization, the court's order shall so state.

By adopting this statute, Ohio has created a liberty interest in its citizens of which it may not deprive them without due process of law. Furthermore, such a liberty interest may be independently protected by the Fourteenth Amendment; the Supreme Court has emphasized that the nature and duration of commitment must bear some reasonable relationship to the treatment purpose for which the person is confined. *Jones v. United States, supra.*

There is absolutely no evidence upon which a reasonable trier of fact could find that Mr. Levine requires confinement in a maximum security facility; none of the mental health professionals testifying in 1988 opined that such confinement was necessary; all recommended a less restrictive commitment or, in most cases, outright release.

Perhaps recognizing the overwhelming weight of the psychiatric evidence in Mr. Levine's favor, the State makes no comment in its Memorandum Contra about the mental health testimony (See Doc. #112).

Judge Angelotta was of course forced to deal with the mental health testimony. His opinion finding Mr. Levine mentally ill quotes for several pages from mental health testimony at the time of the initial trial, upon which he had found Mr. Levine not guilty by reason of insanity, or the release hearing in 1980, which resulted in an unappealed recommitment. He essentially belittles the testimony offered in 1988 (Doc. #104, Appendix HH). He calls Dr. Appelbaum's testimony "insulting and offensive" (*Id.*). He questions the credibility of Dr. John Davis, Medical Director of the Ohio Department of Mental Health because he perceived him as boastful about his credentials (*Id.*). His "evaluation" of Dr. McIntosh's testimony is as follows:

> Dr. McIntosh. This man is a psychologist, not a psychiatrist. A psychiatrist is a medical doctor. Only a medical doctor can give a medical opinion in a court of law.

> Dr. McIntosh must come from the same school as Dr. Davis. Stated more succinctly, I question the integrity of the release process as practiced by the Ohio Department of Mental Health.

(*Id.*) He dismissed Dr. Bertschinger's testimony because he said he received compensation from both sides.

Judge Angelotta then summarized his reaction to the evidence:

> This Judge cannot deal with maybes and probablies [sic]. I need yes and no. Either one is mentally ill or he is not mentally ill.
>
> Doctors can diagnose a broken leg. Doctors can diagnose a heart attack. Doctors can only perhaps diagnose mental illness. The state of a person's mind is obviously a matter of opinion.
>
> Given the fact that psychosis is an illness for which there is no known cure, I find that the perhaps well meaning doctoral diagnosis of remission and recommendation of conditional release to be in error. Or, stated in a more legal sense, the testimony not to be credible.

(*Id.*) In other words, Judge Angelotta reached his conclusion that Mr. Levine is mentally ill subject to hospitalization in a maximum security facility by finding *all* the evidence before him to be incredible and relying on his own projection from the 1979-80 evidence that Mr. Levine was still mentally ill.

The Ohio Court of Appeals dealt with the evidence at considerably more length. (See *State v. Levine*, Case No. 56203, slip opinion attached to Doc. #104 as Appendix JJ).

The opinion first summarizes the account of the surviving victim about the offense in 1979 and Mr. Levine's ex-spouse's testimony about his violent behavior as late as 1980 (*Id.* at 2-4). The court then treats the trial testimony upon which

Mr. Levine was found not guilty by reason of insanity and Lima State reports from 1980 which concluded he was still mentally ill and a danger to others (*Id.* at 4-9).

The Court of Appeals then treats the subsequent psychiatric reports, noting:

1. The panel of Drs. Rizk, Davis, & Vermeulen in 1983 found no mental illness as defined by state law and recommended transfer to a less restrictive facility.

2. Dr. Alquizola in May, 1983, found no thought or affective disorder but recommended continued psychotherapy.

3. The panel of Drs. Pasha, Trevino, and Martin found no mental illness or personality disorder and recommended discharge.

4. The same panel in November, 1985, found no mental illness and that Mr. Levine was not subject to hospitalization.

Dr. Rizk had been called as the State's only expert witness. He essentially repeated his testimony from before: Mr. Levine is diagnosed as having a major affective disorder, bipolar, depressed, in full remission which would be characterized by mood swings when not in remission. He said it was impossible to predict when a person in remission may suffer a relapse. He noted that life at the Dayton Mental Health Center was structured and thus involved less stress than normal daily life and that stress had triggered Mr. Levine's bouts with depression in the past. He noted, however, that Mr. Levine had shown no symptoms of mental illness since 1981 despite cessation of medication, and recommended that he be granted conditional release.

The Court of Appeals noted that Dr. Davis, Medical Director for the Ohio Department of Mental Health, found Mr. Levine had no mental illness and recommended release after a thirty-day observation period in a civil hospital.

Dr. Pasha, Mr. Levine's treating psychiatrist since 1986, found no mental illness and accordingly testified that Mr. Levine had no specific treatment plan (Slip opinion at 15). He found Mr. Levine to be no threat to others and to have reacted quite normally to a number of stressful situations. Dr. McIntosh, Petitioner's ward psychologist, testified to the same effect. Dr. Appelbaum, an examining but non-treating psychiatrist, found no mental illness and low risk of danger to others, but recommended outpatient monitoring. Dr. Bertschinger, another examining but non-treating psychiatrist, reached the same conclusions.

Upon its review of this evidence, the Ohio Court of Appeals concluded:

> We find that the trial court properly exercised its discretion in ordering the defendant's continued commitment. Substantial evidence establishes that the defendant suffers from a mental illness as defined under R.C. 5122.01(A). Dr. Rizk diagnosed the defendant as having a "major affective disorder, bipolar, depressed". Nine other mental health professionals have *at various times* diagnosed the defendants as having similar mental disorders. Both the state's expert witness and the defendant's expert witnesses testified that these diagnoses represent substantial mental disorders which are chronic in nature and incurable.

(Slip Opinion at 23, emphasis added).

In reaching its conclusion, the Ohio Court of Appeals relied on *In re Burton*, 11 Ohio St. 3d 147, 464 N.E. 2d 530 (1984) and *DeVeau v. United States*, 482 A. 2d 1239 (D.C. App. 1984) [cited by the Ohio Court of Appeals as 483 A. 2d 307]. In *Burton* the Ohio Supreme Court adopted a "totality of the circumstances" test for deciding upon hospitalization under §5122.01(B) and held that

> Factors which are to be considered by the court in a commitment hearing include, but are not limited

> to, the following: (1) whether, in the court's view, the individual currently represents a substantial risk of physical harm to himself or other members of society; (2) psychiatric and medical testimony as to the present mental and physical condition of the alleged incompetent; (3) whether the person has insight into his condition so that he will continue treatment as prescribed or seek professional assistance if needed; (4) the grounds upon which the state relies for the proposed commitment; (5) any past history which is relevant to establish the individual's degree of conformity to the laws, rules, regulations and values of society; and (6) if there is evidence that the person's mental illness is in a state of remission, the court must also consider the medically suggested cause and degree of the remission and the probability that the individual will continue treatment to maintain the remissive state of his illness should be released from commitment.

464 N.E. 2d at 534.

Applying the sixth *Burton* factor, the Ohio Court of Appeals found that three factors predominated in explaining Mr. Levine's remission. First it held, based entirely on evidence from 1980 and before, that he modified his threatening behavior in order to be released. Secondly, it found that he lives in a highly structured environment and that the build up of stress in the normal world would create a substantial risk of future violence in the event of future personal or business failure. Third, it held that because he has previously had periods as long as eight years during which he functioned well, and his illness is periodic, the eight years he has been symptom free are not conclusive.

With respect to the first point, if Mr. Levine is controlling his threatening behavior, that would seem to prove that the behavior is not the result of mental illness, but the Ohio Court of Appeals holds his ability to control threatening behavior against him.

As to the second and third points, the Ohio Court of Appeals analysis would permit Mr. Levine's confinement indefinitely in the face of all the psychiatric testimony. The court says he is well because he is in a structured environment and speculates that he would not do well in a less structured environment, despite all the medical recommendations for something less than maximum security. As to the third point, the question is how long Mr. Levine must be symptom-free?

In his testimony at the evidentiary hearing in this Court, Dr. Rizk, the State's expert witness, expanded on the likelihood of relapse given a number of years without symptoms. He testified that when he testified in 1983 that there was a probability of relapse in Mr. Levine's case, he meant a 51% probability and that probability would decrease with time. Of course Mr. Levine has now gone nine years with no medication, no relapse, and no symptoms.

The Ohio Court of Appeals, still analyzing the cause of remission under the *Burton* standard, found there was a likelihood Mr. Levine would not seek treatment because he does not believe he is mentally ill (Slip Opinion at 25). But all of the doctors have told Mr. Levine, as well as the Ohio courts, that there is no need of treatment because Mr. Levine is not mentally ill. There is simply no evidence that his remission is brought about by treatment which he needs to continue if released because he has received no treatment for nine years (seven years as of the 1988 hearings).

The Ohio Court of Appeals relies on a letter Mr. Levine wrote to his wife in March, 1980, saying his crime was "an act of rebellion against society, and its lies and false beliefs." (Slip Opinion at 26). The court observes that the mental health professionals have not interpreted this "revealing statement," but the court interprets it as an accurate statement of Mr. Levine's motivation at the time of the murder. However, this letter was written at a time when psychiatric testimony was the [sic] Mr. Levine was mentally ill; his continued commitment in 1980 was not even appealed. The court may be suggesting that he was not in fact mentally ill when he committed the crime, but that determination is *res judicata*.

Finally, the Ohio Court of Appeals relies on the brutal nature of the crime Mr. Levine committed and concludes that supports his confinement in a maximum security facility.

The Ohio Court of Appeals' reasoning does not support its conclusion. As the Supreme Court held in *Jones v. United States*, 463 U.S. 354 (1983), confinement of those acquitted by reason of insanity must be for the purpose of treatment; the nature and duration of the confinement must bear some reasonable relation to that purpose. The confinement must be based on both continuing illness and continuing dangerousness. The Ohio trial and appellate courts in this case have found continuing illness and dangerousness in the face of *all* the mental health testimony to the contrary and in the face of Mr. Levine's being symptom free without treatment for seven years.

The Magistrate believes that the Constitution permits some inference of continued illness and dangerousness from past behavior and on that basis was willing to accept those findings on the 1983 record[2] However, the State's expert witness in this case concedes the power of that inference declines over time.

Nothing in this Report should be read as exhibiting sympathy for Mr. Levine. If he had been found sane at the time of the offense, there is no question that his continued confinement would be constitutional. But as long as someone has been found not guilty by reason of insanity, he or she may not be punished, *Jones v. United States*, 463 U.S. at 369, and continued confinement without treatment or any need for treatment is punishment, pure and simple.

Here, all of the mental health professionals, including the treating professionals, concluded Mr. Levine was not presently mentally ill. For this Court to conclude, in the face

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[2] A very substantial body of literature, however, questions medical or legal ability to predict future dangerousness from past behavior. See Justice Brennan's dissent in *Jones v. United States*, *supra*.

of that testimony, that there is evidence from which a reasonable trier of fact could conclude to a clear and convincing degree that Mr. Levine is mentally ill and subject to hospitalization by court order would be to deny any impact to the Due Process Clause in this case.

This Court should issue a writ of habeas corpus ordering Mr. Levine's conditional discharge forthwith.

June 28, 1990.

/s/

Michael R. Merz
UNITED STATES MAGISTRATE

THE SUPREME COURT OF OHIO

1990 TERM

To wit: June 13, 1990

State of Ohio, Appellee,	:	Case No. 90-415
v.	:	ENTRY
Michael G. Levine, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Stege, Delbaum & Hickman Co., L.P.A.

(Court of Appeals No. 56203)

/s/

THOMAS J. MOYER
Chief Justice

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 56203

STATE OF OHIO Plaintiff-Appellee -vs- MICHAEL G. LEVINE Defendant-Appellant.	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION: JANUARY 25, 1990

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court Case No. CR-047714

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION: _____

APPEARANCES:

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J.F. CORRIGAN, J.:

The defendant[1] appeals from the trial court's judgment ordering the defendant's continued commitment of a maximum security mental health facility. On September 26, 1979 the trial court found the defendant not guilty by reason of insanity of the aggravated murder of an elderly man, the attempted aggravated murder of the man's wife, and associated kidnapping, aggravated burglary, and extortion charges. The trial court, in 1980 and 1983, denied the defendant's requests for release made pursuant to R.C. 2945.40. This court affirmed the trial court's latter order of continued commitment. See *State v. Levine* (Nov. 5, 1984), Cuyahoga App. No. 47976, unreported. This appeal arises from the proceedings on continued commitment held in July of 1988.

The defendant, in two assignments of error, argues that (1) clear and convincing evidence does not support the trial court's judgment, and (2) Ohio's statutory scheme for the

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[1] For the sake of clarity, the appellant is referred to as defendant herein, although he was found not guilty by reason of insanity.

commitment of those found not guilty by reason of insanity is unconstitutional as applied to him. These claims lack merit, so we affirm the trial court's commitment order.

I.

At the hearing on recommitment, the state argued that the defendant was "mentally ill" as defined under R.C. 5122.01(A) and that by virtue of his illness posed a danger to others thus requiring his hospitalization as provided under R.C. 5122.01(B)(2). The defendant claimed that he had exhibited no symptoms of mental illness for seven years and that he was effectively free of any mental illness which would permit the state to continue his psychological commitment. Since our review requires a consideration of the totality of the circumstances in this case, we feel compelled to thoroughly recount the evidence adduced at the commitment hearing. Cf. *In re Burton* (1984), 11 Ohio St. 3d 147, paragraph one of the syllabus.

The state introduced the testimony of the decedent's widow who survived the defendant's attack and the deposition testimony of the defendant's former wife. The decedent's widow testified in regard to the nature of the offense which resulted in the defendant being found insane. The defendant's wife testified concerning the defendant's behavior during their marriage.

The decedent's widow testified that on May 2, 1979 at approximately 7:30 a.m., the defendant and another man came to the couple's apartment claiming to be police officers. Upon entering the apartment, the two men drew guns and the defendant in a "cold" and controlled manner, ordered the decedent to telephone his stock broker to sell the decedent's stock for a certain amount of cash. However, the decedent explained that he could not readily obtain cash for such a stock transaction. Thereupon the defendant and his accomplice conducted the couple to an automobile and drove them to a local motel. There the decedent pleaded for the couple's lives and promised to raise enough money to satisfy the defendant's demands. However, the defendant

expressed dissatisfaction with the amount of these offers.

The defendant and his accomplice then escorted the two to the automobile and drove aimlessly through the neighborhood. At one point, they stopped in order to permit the decedent to call his banker from a public telephone. However, the decedent failed in his attempt to contact his banker and he returned to the automobile. After driving for a short while the decedent said "something" to the defendant and the defendant turned around and shot the decedent to death and then shot the decedent's wife.

The defendant's wife testified that she has known the defendant since the two dated in high school in the early 1960's. She testified that during the time that they dated until their marriage in 1968, the defendant would periodically have sudden violent outbursts during which he would beat her. On one occasion the defendant broke her nose. The witness testified that periods of calm followed the defendant's violent outbursts.

The witness testified that the defendant exhibited no violent behavior during the first six years of their marriage. However, in 1974, the defendant was hospitalized for one week in order to treat depression. Thereafter the defendant came under the regular care of psychiatrist, Dr. Pezso Levendula. While under the doctor's treatment, the defendant again experienced outbursts of violent behavior followed by periods of calm. The defendant's former spouse testified that the defendant vented accumulated personal and business stress in violent outbursts against others. She stated that in 1978 during a domestic quarrel, the defendant pulled a phone out of a wall, punched a hole through the closet door, threw household items against the walls of their home, and smashed pictures and mirrors throughout the house. The defendant further grabbed his wife's eyeglasses from her face and shot holes in the wife's automobile with a gun. The witness testified that the defendant was under Dr. Levendula's care at the time of the murder.

The defendant's wife further testified that the defendant skillfully manipulated people. She stated that shortly after the trial court committed the defendant after finding him not guilty by reason of insanity, the defendant told her that he would be free from incarceration in three months "because he knew what he was doing." The witness said that during 1979 and 1980 she received threatening letters and telephone calls from the defendant. These threats discontinued after she notified the local media. During this period the defendant also made grandiose promises to the couple's three children. She stated that she has had no contact with the defendant since that time.

The defense introduced as evidence fourteen reports of mental health professionals who did not testify at the hearing but who had treated or examined the defendant at various times since 1966. These reports provide a comprehensive mental history of the defendant.

In 1966 the defendant obtained a release from jail, where he had apparently been incarcerated on a forgery charge, in order to admit himself at a local hospital for treatment of depression. He remained hospitalized for thirty-four days. His treating physician entered the following diagnosis of the defendant upon his release: "Schizophrenic reaction, schizo affective type, associated with depression, severe, improved."

In 1974, the defendant again sought treatment for depression and remained hospitalized for twenty-eight days. The defendant admitted that he had an "urge to kill someone" and described himself as a "walking bomb". At this time the treating physician diagnosed him as being a manic depressive with "unipolar depression" and an "explosive personality".

Dr. Levendula, in a report prepared for the defendant's counsel, in 1979 stated that he had treated the defendant since 1973. The defendant first came to him complaining of depression. During the next six years the doctor saw the defendant on a regular basis two to eight times a month.

The defendant revealed to the doctor homicidal and suicidal urges. The defendant's voluntary hospitalization in 1974 came as a result of the doctor's recommendation. The doctor stated that the defendant's homicidal and suicidal tendencies appeared to have abated at this time through psychotherapy and anti-psychotic medication.

In late 1978 and early 1979 the defendant, apparently reacting to the stress of maintaining his private business and the threat of separation from his wife, exhibited increasingly violent tendencies.

On April 21, 1979, the doctor went to the defendant's house at the request of his wife who claimed that the defendant was in a violent rage and threatened her safety and the safety of the couple's children. Upon his arrival, the defendant appeared calm and denied his violent behavior. Three days later the defendant met the doctor at his office. The doctor stated in his report that the defendant appeared composed at that time. Seven days after this final meeting with the doctor, the defendant murdered the victim.

The doctor refrained from pronouncing a clinical diagnosis of the defendant in his report. He merely stated his opinion that at the time of the crime the defendant had a defect of the mind that so impaired his reason that he did not appreciate the wrongfulness of his acts and could not refrain from committing them.

A defense psychiatrist, Dr. Emanuel Taney, filed a report in 1979 in support of the defendant's claim that he was legally insane at the time of the crime. The psychiatrist based his report upon an interview with the defendant, reports from other doctors on the issue of insanity, and the defendant's medical records. He diagnosed the defendant as having "a psychotic illness" which precluded his ability to refrain from committing the criminal acts and which precluded his ability to appreciate the wrongfulness of his acts.

The defendant also submitted as evidence the evaluations of two court psychiatrists and one court psychologist ordered

and received by the trial court in conjunction with the sanity determination in 1979. See R.C. 2945.39.

Dr. Phillip J. Resnick of the county court of common pleas psychiatric clinic examined the defendant for approximately five hours over the course of four separate meetings in June and July of 1979. In relation to the actual crime, the defendant told him that "all the frustration went out of me with those bullets." The defendant claimed that he had never felt such peace of mind. He felt no compassion or remorse for the victim. The doctor diagnosed the defendant as having "schizo-affective schizophrenia" and an "explosive personality". He described the defendant at the time of his evaluation as being "not actively psychotic." The doctor, in his evaluation of the defendant's mental status, stated that the defendant had both suicidal and homicidal potential for the future.

A second court psychiatrist, Dr. Stuart Younger, examined the defendant for one hour on August 29, 1979 and for fifteen minutes on September 5. This doctor too based his report both upon his interviews with the defendant and records filed with the trial court. He diagnosed the defendant as having a "major" psychiatric illness which could variously be labeled "manic depressive illness", "psychotic depression", "paranoid schizophrenia" or "schizo-affective schizophrenia". He described the defendant as having a "[p]ersonality disorder characterized by impulsiveness, outbursts of violence, amorality, and disregard for the feeling of others." The doctor stated:

> "Although I saw no evidence of psychotic mental illness in my clinical interviews with the defendant, the history of psychosis in the two hospitalizations and on the psychological testing *** is impressive. My opinion from reading the various reports and my interview with the defendant is that the severity of the illness waxes and wanes and at times the defendant is in remission by which I mean there is no evidence of psychotic mental illness."

Both court psychiatrists concluded that the defendant was legally sane at the time of the attacks.

A clinical psychologist, Dr. Stanley Althoff, administered various psychological tests to the defendant in June of 1979. He determined that the defendant had "average" intelligence. His initial clinical impression of the defendant was of a "mildly depressed, impulsive, generally intact fellow." However, he stated tests revealed the defendant as being "prone to episodic and violent affect storms where he likely explosively [sic] releases stored up primitive aggression." He found the defendant to be "moderately manipulative" of others. The doctor concluded,

> "The outstanding feature of [the defendant's] psychological testing is his preoccupation with violence and destruction. ***. The results of the psychological [testing] suggests a diagnosis of schizophrenia, schizo-affective type, (depression), with strong paranoid features."

Two status reports written in 1980 by Dr. Lewis Lindner, the clinical director at Lima State Hospital where the trial court first committed the defendant, show that the defendant continued to suffer from several mental impairments. The report filed by the doctor in July of 1980 reveals the defendant to have been "superficially cooperative", concealing considerable anger and hostility. The defendant appeared preoccupied with vengeance against those perceived to have wronged him. He manifested no remorse for his actions. He diagnosed the defendant as being a paranoid schizophrenic with a narcissistic and paranoid personality.

The doctor's report of the panel review conducted by staff members for the defendant in October of 1980 shows the defendant to have been "extremely obsessed" with his legal situation. The panel concluded that the defendant still suffered from mental illness which posed a danger to others. However, based upon the fact he had not exhibited recent violent behavior, the panel recommended his transfer to a civil mental hospital.

In response to this panel recommendation, the trial court requested a review by a court psychiatrist, Frank Miller. The doctor, in his report dated November 6, 1980, stated that the defendant continued to exhibit no remorse for his acts. He noted from the defendant's secretive conduct with Dr. Levendula that the defendant "is capable of great deception." He diagnosed the defendant as having partially remitted "paranoid schizophrenia" and concluded that the defendant remained dangerous and accordingly required continued commitment in a maximum security facility.

In 1983, a panel consisting of Department of Mental Health psychiatrists: Magdi Rizk, John Davis, and John Vermeulen, reviewed the defendant's mental status and submitted their report to the trial court. They based their report, filed March 17, 1983, upon a two-hour interview of the defendant, interviews with facility staff members, and a review of the records in the case.

The panel found that the defendant had been generally cooperative with staff members. Since the time of his admission to the hospital on October 5, 1979, the defendant had failed to exhibit violent or suicidal behavior or symptoms of psychosis. His doctors discontinued prescribing anti-psychotic medication in May of 1981. At the time of the review, the defendant occasionally received small dosages of anti-depressant medication in order to treat mild depression.

Before the panel, the defendant stated in explaining the crime: "A senseless act of violence, it is hard for me to believe that I took a human life ***." The consensus of staff members was that his mental illness was in complete remission. They reported that except for one time when the defendant made verbal threats against the trial judge, he had not exhibited physically aggressive or threatening behavior.

The panel diagnosed the defendant as having a "Major affective disorder, [b]ipolar depressed in full remission" and a narcissistic personality disorder. They concluded that at that time the defendant was not suffering from a mental illness

as defined under state law. However, the panel reported that the defendant would always require treatment to combat depression or psychosis to which he is predisposed. The panel recommended his transfer to a less restrictive facility.

Dr. Tito Alquizola, staff psychiatrist at the Dayton Mental Health center where the defendant was transferred to on May 17, 1983, filed a status report concerning the defendant on January 14, 1985. Based upon his review of the defendant's records and an hour-long interview with the defendant, the doctor reported that the defendant had exhibited no symptoms of an affective disorder since his admission to the facility. The doctor stated:

> "It is possible that such symptomatologies as had been observed before the offense are psychiatric facets which [the defendant] shows when under severe pressure such as is inevitable in the less structured outside world. *** [I]t is quite possible that the absence of very real pressures, such as maintaining domestic and other relationships, responding to business pressures, that freedom from such stress are enough to prevent the recurrence of his previous symptoms."

The doctor concluded that the defendant had no thought or affective disorder which required treatment of any kind. However, he recommended continued psychotherapy in order to monitor the possible recurrence of symptoms of his previous mental disorders.

The Department of Mental Health formed a panel of two staff psychiatrists, Dr. Jaseem Pasha and Dr. Joseph Trevino, and one consulting psychologist, Dr. Thomas Martin, to address Dr. Alquizola's recommendation that the defendant be discharged from the Dayton Mental Health Center. The panel concluded that the defendant suffered from no mental illness or personality disorder, nor represented a substantial risk of physical harm to himself or others. The panel refused to speculate concerning his future potential for violent behavior, merely noting that those with a prior history of

violent behavior have a greater propensity for violence in the future than those without a history of violence. The panel accordingly recommended the discharge of the defendant.

The same panel evaluated the defendant at the end of 1985. In a report dated November 12, 1985, the panel reaffirmed its earlier conclusions, stating: "[The defendant's] period of 'insanity' was of brief duration and extremely self-limited, and clinically resolved itself completely without the aid of any anti-psychotic medications." Once again, the panel concluded that the defendant was not subject to hospitalization.

At the hearing on recommitment, the state called as its only expert witness Dr. Magdi S. Rizk, a court psychiatrist. The state further called, as if on cross-examination, Dr. John Davis, the Medical Director for the Ohio Department of Mental Health.

The defendant called as its expert witnesses Dr. Pasha, the defendant's treating psychiatrist at the Dayton Mental Health Center, Dr. William McIntosh, psychology director at the center, and two experts in forensic psychiatry, Dr. Paul Appelbaum and Dr. Kurt Bertschinger.

Dr. Rizk testified that he examined the defendant once in 1979, once in 1982, once in 1985, once in 1987, and once in 1988. He initially examined the defendant in connection with his eligibility for civil commitment after his being found not guilty by reason of insanity. The doctor testified that from his examination of the defendant and the defendant's records, he diagnosed the defendant has having "major affective disorder, bipolar, depressed, in full remission." He further concluded that the defendant suffered from narcissistic personality disorder.

The doctor explained that the term "major affective disorder" meant that the individual suffered from severe mood swings. The illness is characterized by swings of mood between severe suicidal depression to reckless euphoria.

The witness defined the term "bipolar depressed" as describing an individual with a past history of manic attacks.

The doctor testified that an individual who has a specific mental illness in remission either exhibits no symptoms of the illness or exhibits only mild symptoms. He stated that one cannot predict when a person in remission may suffer a relapse.

The witness testified that the defendant's history indicated that stress triggered the defendant's bouts of severe depression. He opined that the Dayton Mental Health Center's structured atmosphere involved less stress than normal daily life. He stated that the defendant's exposure to these outside pressures could possibly result in a relapse of his condition. However, he stated that the defendant currently shows no signs of a substantial disorder of thought, mood, perception, orientation, or memory.

The witness testified that during his interviews the defendant expressed remorse for his actions. Because the defendant had exhibited no violent behavior or symptoms of mental illness without medication since 1981, and because he had cooperated with the facility's staff in his treatment, the doctor recommended that the defendant be granted his conditional release. The conditional release as recommended by the witness, would involve continued biweekly contact with a mental health professional and notice to the trial court within twenty-four hours of the defendant's failure to attend one of those sessions.

Doctor Davis testified that he examined the defendant once in 1982 as part of a panel review and once in 1988. He testified that his 1988 examination of the defendant lasted from one to two hours. The doctor denied advising the defendant concerning strategy to obtain his release. However, he admitted telling the defendant, "when you approach [the trial judge], you have to approach it like a poker game; aim high but be willing to settle in the middle ground." He further admitted discussing with the defendant the alternative to seeking conditional release as opposed

to unconditional release. He denied being predisposed toward obtaining the release of the defendant.

The witness testified that the defendant currently has no mental illness. He admitted diagnosing the defendant in 1982 as having an affective disorder, bipolar depressed, in remission with a narcissistic personality disorder. However, he hypothesized that that initial diagnosis may have been incorrect since the defendant had had no psychotic episodes for six years even though his medication had been discontinued.

The doctor recommended that the defendant be conditionally released to a civil hospital where he would remain for 30 days undergoing observation. Thereafter, he recommended that the defendant be released into society.

Dr. Pasha, in testifying on behalf of the defendant, stated that he had been the defendant's treating psychiatrist at the Dayton Mental Health Center since July of 1986. He further testified that prior to that time he participated in a panel review of the defendant's mental status in November of 1985 and personally examined him once in January of 1985. The witness said that as his treating psychiatrist, he sees the defendant generally once a week.

The doctor testified that since 1986 the defendant had been assigned to the least restrictive ward in the facility and has been afforded maximum privileges. The doctor has not oberserved any symptoms of mental illness in the patient, and accordingly, the defendant does not have a specific treatment plan.

The witness testified that since his admission to the center there is no documented instance where the defendant exhibited behavior which would have placed another in fear of harm. He further testified that he personally has not observed such behavior. He concluded that the defendant does not represent a threat of imminent danger to himself or others.

The doctor related several instances where the defendant reacted to what the doctor described as "stressful" situations in a normal manner. In the summer of 1987, the facility temporarily transferred the defendant from the least restrictive ward to the center's maximum security ward to discipline him for the possession of certain banned personal articles. The facility transferred him back to the maximum privilege ward after a week. He was again transferred to the maximum security ward shortly thereafter for three and a half months for an undisclosed reason. In 1988, the state transferred the defendant to the county jail in Cleveland in order for him to undergo examinations conducted by a court psychiatrist. Due to an administrative error, the defendant remained at the jail during the weekend rather than being immediately transfered back to the Dayton Mental Health Center.

In each of these instances, the defendant complained bitterly to authorities, but exhibited no violent behavior. The defendant further made vague threats that "someone would pay" for these actions. Dr. Pasha testified that the defendant's response to each of these inconveniences fell within the range of normal behavior. He interpreted the defendant's threats as being threats of administrative and legal actions rather than being threats of physical harm to any one individual.

The witness admitted that the defendant had previously been diagnosed in 1966 as "schizophrenic reaction, schizo affective type." He stated that such a diagnosis indicated a chronic mental illness which has no known cure.

The doctor, in conclusion, stated that the defendant did not have a mental illness as defined by statute. He recommended a release of the defendant with court ordered follow-up psychiatric and psychological monitoring. The doctor recognized that the defendant had some emotional stress problems that did not amount to a mental illness. However, he opined that the defendant would adjust "pretty well" to outside stresses because he had developed effective coping strategies during his commitment. The doctor stated

that the defendant had a "fair to good" chance of never being involved with the law again. He did not believe that the defendant could have concealed a mental illness from him or other staff members during his stay at the mental health center.

Dr. William McIntosh testified that he had been the psychology supervisor at the Dayton Mental Health Center since March of 1980 and the psychologist assigned to the defendant's ward since February of 1985. He stated that he has conducted formal psychological examinations of the defendant in 1983, November of 1985, June of 1986, May of 1987, December of 1987, and April of 1988. The doctor testified that he sees the defendant either casually or formally on a daily basis. He estimated his total amount of personal contact with the defendant as exceeding one thousand hours.

The witness described the defendant as being non-aggressive and well-behaved. He opined that the defendant expresses his anger and frustration in a normal manner.

He testified that the defendant was twice transferred from the privileged unit at the center to the most restrictive ward. The first transfer resulted from the discovery by staff members that the defendant possessed a cigarette lighter, a nail clipper, and vitamin supplements in violation of the facility's regulations. The second transfer occurred for a reason undisclosed to him by the facility's administration.

However, the doctor claimed the administrators did not transfer him for a clinical reason, nor did he observe or discover recorded instances of violent misbehavior. Dr. McIntosh testified that these transfers extremely upset the defendant because he considered them unjust. However, the defendant's reactions to those transfers fell within the limits of normal behavior. His threats that "someone would pay" constituted more of a general expression of anger and frustration as opposed to a real threat of harm to another.

Dr. McIntosh testified that during the defendant's commitment at the center the doctor observed no sign that the defendant had a substantial disorder of thought, mood, perception, orientation, or memory. Repeated psychological tests conducted on the defendant revealed no sign of mental illness. The witness stated that the validity components of these psychological tests indicated that the defendant took the tests in a "reasonably open" and "forthright" manner.

The doctor testified that during his commitment at the center there have been no instances of direct physical aggression involving the defendant. The doctor has observed no characteristics of dangerous behavior in the defendant and concluded, based upon both his current and past behavior, that the defendant poses no current threat of danger to anyone. The doctor recommended the conditional release of the defendant with court-ordered monitoring by a mental health professional.

The witness agreed that various mental health professionals had previously diagnosed the defendant as having various chronic, incurable mental illnesses. However, he concluded from his examinations and the review of the defendant's medical history that those diagnoses were incorrect according to current standards.

The witness agreed that the defendant would experience substantially different stresses in the outside world than the stresses he faces within the mental health facility.

Dr. Appelbaum testified that he reviewed the defendant's entire treatment record and examined the defendant in May of 1988 for approximately four hours. The doctor stated that he found no evidence that the defendant suffered from a substantial disorder of thought, mood, perception orientation, or memory.

In determining whether the defendant posed a danger to others, the doctor first noted that the defendant had exhibited no violent behavior since 1982. He deemed the circumstances of the defendant's commitment to be highly

stressful and further considered as exacerbating this stressful situation the defendant's failures to obtain his release. He found the absence of violent outbursts during his commitment to be even a more compelling factor in light of the stressful circumstances. In addition, the witness took into account the defendant's apparent lack of vengeful motives and the current absence of the symptoms of mental disorder evident at the time of the crime. Based upon his consideration of these factors the doctor opined that the defendant represents a low risk of danger to others during a period of several months following his release. The doctor stated that he could not make a prediction based upon reasonable medical certainty beyond that period because he could not predict the environmental factors that could impact the defendant. He offered that continued professional outpatient monitoring of the defendant would be required after his release in order to assess the defendant's reaction to stresses encountered in the outside world.

The doctor testified that during his interview the defendant expressed remorse concerning the crime and the harm caused to the victims' family and his own family.

Dr. Bertshinger testified that he examined the defendant in March of 1988 for approximately two hours at the behest of the Department of Mental Health. He further spent two and one-half hours reviewing the defendant's clinincal records.

The doctor testified that based upon the interview and the defendant's records the defendant suffered from no mental illness. He doubted that the defendant has been able to conceal a mental illness since the records of the Dayton Mental Health Center disclosed that the defendant has exhibited no symptoms of mental illness since his admission. The witness further stated that he was satisfied that the defendant posed no threat to others. Dr. Bertschinger based his opinion upon the fact that the defendant had exhibited no violent behavior since his commitment at the mental health center in 1982. The doctor recommended the conditional release of the defendant which would include

a transitional two-month commitment at a civil mental hospital followed by indefinite outpatient monitoring.

The trial court, upon considering this evidence, determined that the defendant was mentally ill as defined by R.C. 5122.01(A) and subject to hospitalization pursuant to R.C. 5122.01(B)(2). Accordingly, the trial court ordered his recommitment to the Dayton Mental Health Center.

I.

The defendant, in his first assignment of error, argues that clear and convincing evidence does not support the trial court's recommitment order.

A trial court may order the continued commitment of an individual where clear and convincing evidence establishes that that individual is a mentally ill person subject to court-ordered hospitalization. See R.C. 2945.40(C); R.C. 5122.15(C).

> " 'Mental illness' means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."

R.C. 5122.01(A). R.C. 5122.01(B) provides in relevant part:

> " 'Mentally ill person subject to hospitalization by court order' means a mentally ill person who, because of his illness:
>
> "***
>
> "(2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence or present dangerousness;

"***."

In making the determination of whether a person is subject to hospitalization under R.C. 5122.01(B), the trial court must consider the "totality of the circumstances." Cf. *In re Burton* 91984), 11 Ohio St. 3d 147, paragraph one of the syllabus (commitment upon determination that defendant incompetent to stand trial).

> "Factors which are to be considered by the court in a commitment hearing include, but are not limited to, the following: (1) whether, in the court's view, the individual currently represents a substantial risk of physical harm to himself or other members of society; (2) psychiatric and medical testimony as to the present mental and physical condition of the alleged incompetent; (3) whether the person has insight into his condition so that he will continue treatment as prescribed or seek professional assistance if needed; (4) the grounds upon which the state relies for the proposed commitment; (5) any past history which is relevant to establish the individual's degree of conformity to the laws, rules, regulations and values of society; ***."

Id. at 149-150. A trial court must evaluate a person's present mental state in light of his current behavior, recent behavior, and his past dangerous propensities. *Id.* at 149.

While the trial court must consider the expert medical testimony in determining whether continued hospitalization shall be ordered, the question of release is ultimately one of law. Cf. *DeVeau v. United States* (D.C. App. 1984), 483 A.2d 307, 312 (construing analogous District of Columbia code section). Accordingly, the trial court is not required to accept the consensus of medical opinion concerning the issues of whether an individual has a mental illness or whether an individual poses a danger to society. Cf. *id.*

The trial court has broad discretion in making the

determination as to whether commitment shall be continued. Cf. *id.*, at 149-150. Accordingly, this court shall not reverse the trial court's commitment order absent an affirmative showing that the trial court acted unconscionably, arbitrarily, or unreasonably. Cf. *id.*

We find that the trial court properly exercised its discretion in ordering the defendant's continued commitment. Substantial evidence establishes that the defendant suffers from a mental illness as defined under R.C. 5122.01(A). Dr. Rizk diagnosed the defendant as having a "major affective disorder, bipolar, depressed". Nine other mental health professionals have at various times diagnosed the defendant as having similar mental disorders. Both the state's expert witness and the defendant's expert witnesses testified that these diagnoses represent substantial mental disorders which are chronic in nature and incurable.

We recognize the Dr. Rizk testified that the defendant's mental illness is in "full remission". An individual whose mental illness is in a state of remission is subject to continued commitment pursuant to R.C. 5122.01(B) if there is a "substantial likelihood" that the individual's release will result in physical harm to others. *In re Burton, supra*, at 150. This determination shall be made on a case by case basis. Cf. *State v. Levine, supra*.

The circumstances in this case warrant the defendant's continued commitment. In determining whether a person who has a mental illness in a state of remission poses a danger to society the trial court must consider (1) the cause of the remission, and (2) the probability that the individual will continue treatment to maintain the remissive state of his illness upon his release. Cf. *Id.*

Three factors predominate in explaining the defendant's "remission". First, the defendant's modification of his threatening behavior coincided with his appreciation of the legal consequences of his conduct. The evidence discloses that the prospects for release highly motivate him to conform his conduct to social norms.

Secondly, the defendant currently lives in a highly structured environment. While we are cognizant that the defendant does not exist in a stress-free vacum, the stresses the defendant currently must deal with differ in kind and in degree with the stresses encountered in the outside world. The evidence substantiates the fact that the build-up of stress triggers the defendant's violent behavior. Accordingly, the defendant's current release would involve the substantial risk that any future personal or business failure would cause the defendant to react violently.

The third factor to be considered in explaining the fact that the defendant currently fails to exhibit symptoms of mental illness is the periodic nature of his disorder. The defendant's history prior to the offense discloses that the defendant has had periods for as long as eight years during which he has functioned at a very high level. Approximately eight years have passed since the last time the defendant exhibited violent tendencies. Given the likelihood that (1) the fact that the defendant is currently motivated to obtain his release, and (2) the fact that he currently resides in a relatively stress-free environment are circumstances which serve to inhibit the frequency of his periodic violent outbursts, release at the current time would be premature.

In evaluating the probability that the defendant would continue treatment upon his release, three factors impress this panel. First, the paucity of evidence that the defendant feels remorse and/or sorrow with regard to the attack on the victims or that the defendant fully appreciates his condition. At the hearing the defendant represents through counsel that he has no mental illness. Thus, it is problematical that upon his release the defendant would seek help in ensuring the continued remission of his illness.

Moreover, the defendant appears to lack fundamental insight into why he committed the offense. The record does not reveal that the defendant believes that his acts of violence resulted from a mental illness. To the contrary, the record reveals that the defendant may feel that he acted for non-pathological reasons. Throughout his interviews with mental

health professionals the defendant has characterized the plan which resulted in the killing as a "money-making scheme". The defendant in one letter to his wife indicated that the crime "was an act of rebellion against society, and its lies and false beliefs."[2]

Nowhere in the record does it indicate that any of the mental health professionals ascertained what Mr. Levine meant by that revealing statement. A reasonable interpretation of the statement is that somehow the brutal kidnapping, wounding and murder were justified and were motivated by a sincere desire to protest the "lies and false beliefs" of society.

In concluding that the trial court properly ordered the defendant's recommitment, we are also mindful of the nature of the offense which resulted in the defendant's hospitalization in a maximum security mental health facility. Ten years ago, the defendant brutally slew an elderly man and severely wounded his wife. This circumstance, in conjunction with the circumstances discussed above, requires the trial court to act with deliberate caution prior to permitting the defendant to reenter society. For these reasons we also conclude that pursuant to R.C. 5122.15(E), the decision of the trial court that the Dayton Mental Health Facility constitutes the least restrictive setting for appellant's commitment is justified since that determination is consistent with both his treatment needs and public safety concerns. *State v. Johnson* (1987), 32 Ohio St. 3d 109.

Accordingly, we overrule the defendant's first assignment of error and affirm the trial court's commitment order.

III.

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[2] It should be noted *in 1982* a review panel of Department of Mental Health psychiatrists reviewed Mr. Levine's status and found that since the time of his admission to the hospital *on October 5, 1979* he failed to exhibit violent or suicidal behavior or symptoms of psychosis. The letter to his wife was written on *March 18, 1980.*

The defendant, in his second assignment of error, raises various claims challenging the constitutionality of Ohio's statutory commitment scheme as applied in this case. Our review of the record discloses that the defendant has waived these claims since he failed to raise them with the trial court. *See State v. 1981 Dodge Ram Van* (1988), 36 Ohio St. 3d 168, 170. Furthermore, this court in substance addressed and overruled these claims in the defendant's prior appeal. See *State v. Levine, supra*, slip opinion at 7-9.

Accordingly, we overrule the defendant's second assignment of error and affirm his recommitment to the Dayton Mental Health Center.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a specific mandate issue out of this curt directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SWEENEY, P.J., and
PARRINO*, J., CONCUR.

/s/
JOHN F. CORRIGAN
JUDGE

*Judge Thomas J. Parrino, Retired of the Eighth District Court of Appeals, sitting by assignment.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

STATE OF OHIO)
CUYAHOGA COUNTY) SS.

IN THE COURT OF COMMON PLEAS

MAY TERM, 1988
To WIT: JULY 11 1988

STATE OF OHIO Plaintiff : No. CR- 047714
:
vs. : INDICTMENT
: AGGRAVATED MURDER.
MICHAEL G. LEVINE : ATTEMPT AGGRAVATED
: MURDER. KIDNAPPING
Defendant : AGGRAVATED BURGLARY.
: EXTORTION

JOURNAL ENTRY

PETITIONER RESTS. ARGUMENT. COURT FINDS PETITIONER LEVINE TO BE A MENTALLY ILL PERSON, SUBJECT TO HOSPITALIZATION BY COURT ORDER. PETITIONER LEVINE RECOMMITTED TO DAYTON FORENSIC CENTER. PER 2945.40. REVISED CODE OF OHIO. RETURN ORDERED.

JUDGE /s/
JOHN L. ANGELOTTA

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State of Ohio vs.
Michael Levine

MONDAY, JULY 11, 1988 PROCEEDINGS

THE COURT: Ten years ago Michael J. Levine shot and killed Mr. Julie Kravitz and wounded his wife.

This Judge was obliged, under the law, to determine whether the then Defendant was guilty of murder or whether or not he was not guilty be reason of insanity.

Testifying for the now Petitioner were, among others, psychiatrists Dezlo Levendula, Emanuel Tanay, Frank Miller. Medical records of the 1966 commitment of St. Vincent Charity Hospital and a 1974 commitment at Mt. Sinai Hospital authored by psychiatrists Charles Centa and Dr. Manuel Arlen were received in the evidence. Psychological evaluations were also received in the evidence.

Diagnosis included schizophrenia, manic depressive, major affective disorder bipolar.

Now, regardless of what label you put on the illness, all of the doctors agreed that Michael J. Levine was psychotic.

The evidence was abundantly clear that he suffered chronic illness for which there was no known cure.

Believing the above-named doctors, I made a finding of not guilty by reason of insanity.

Mr. Levine was committed to the Lima State Hospital. Since then Dayton Forensic Center is the substituted hospital of commitment.

Today the question before this Judge is whether or not the Petitioner, Michael J. Levine, is a mentally ill person subject to hospitalization by court order. Again, I ask that the record reflect that I charge myself with the applicable law.

At this hearing the past few days, all the doctors agreed that past history is relevant. Some say past history is crucial. Past history includes the fact that Mr. Kravitz was killed and Mrs. Kravitz was wounded by reason of a sudden outburst of anger and violence.

The record is replete with other such instances of anger and violence, whether they be upon Dr. Levendula, Judge Angelotta or Mrs. Linda Levine, and the record includes other sundry and lesser instances or events.

Also in evidence is the colloquy between Dr. Resnick and Michael Levine, and I quote Dr. Resnick: "Shooting at a side of beef or a rabid dog. No remorse. Feeling no worse initially than if I had killed an ant. All the frustration went out of me with those bullets. I never felt such peace of mind. He reports that he felt he had no control over his actions." Unquote.

And then the most troublesome statement of all, again quoting Dr. Resnick: "Mr. Kravitz continued to say 'I'm dying.' This meant nothing to Michael Levine. When he left Mr. Kravitz dying in the car, he felt no compassion or remorse. He did not feel he was shooting a human being."

Past history tells us that in unstructured situations, he is prone to violence and destruction. He becomes overwhelmed when emotions are stimulated. Primitive aggression would most accurately describe his responses and his actions. He decomposes, as the doctors would say.

The letters to Mrs. Linda Levine, an after the fact occurrence, are most grievous. They generally express a desire to kill, should the Petitioner be released. I genuinely fear for the life of this lady.

Now, I appreciate that all the doctors who testified at the hearing suggest that Mr. Levine should be conditionally released.

Dr. Rizk tells us that he is quote "vulnerable if under stress, a liability," unquote.

Dr. Pasha suggests that the prognosis is quote, "fair to fairly good" unquote; that chances are that quote "he will not become involved with the law again," unquote.

Dr. Appelbaum has familiarized himself with this case only over the past several months. Essentially he tells us that all of the doctors and all of the psychologists who have cared for and treated this patient over the years are wrong in their diagnosis. How insulting and offensive.

Then we have the Medical Director of the Ohio Department of Mental Health, Dr. John M. Davis. When this fellow was questioned as to this credentials, he states, quote, "Where do you want to begin?" unquote. Upon further inquiry as to credentials, he states, "How much time do we have?" unquote. Must I say more?

The medical evaluation of Mr. Levine as conducted by Dr. Davis was recorded on tape. We have not heard this tape recording in open court. I find that it is not necessary to hear the tape because the doctor admits on cross examination that he did 90 percent of the talking; that the subject matter of the discussion was release strategy.

The doctor admits that he told Mr. Levine that release is like a poker game. Approach Judge Angelotta aiming high but settle in low.

This testimony of Dr. Davis really doesn't deserve further comment.

Dr. McIntosh. This man is a psychologist, not a psychiatrist. A psychiatrist is a medical doctor. Only a medical doctor can give a medical opinion in a court of law.

Dr. McIntosh must come from the same school as Dr. Davis. Stated more succinctly, I question the integrity of the release process as practiced by the Ohio Department of Mental Health.

Dr. Bertschinger, a witness receiving compensation from both sides. This Judge cannot deal with maybes and probablies. I need yes and no. Either one is mentally ill or he is not mentally ill.

Doctors can diagnose a broken leg. Doctors can diagnose a heart attack. Doctors can only perhaps diagnose mental illness. The state of a person's mind is obviously a matter of opinion.

Given the fact that psychosis is an illness for which there is no known curre, I find that the perhaps well meaning doctoral diagnosis of remission and recommendation of conditional release to be in error. Or, stated in a more legal sense, the testimony not to be credible.

The State of Ohio has proven by clear and convincing evidence that Michael J. Levine is a mentally ill person whose mental illness represents a substantial disorder of thought, mood and perception that grossly impairs his judgment, behavior and capacity to recognize reality or ability to meet the ordinary demands of life.

In finding Michael J. Levine to represent a substantial risk of physical harm to others. I find him to be dangerous.

It is therefore, ordered that Michael J. Levine be recommitted to the Dayton Forensic Center.

Mr. Ryan, please adjourn the court.

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(Proceedings concluded.)

FILED, APRIL 14, 1993

Nos. 92-3625/3712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL LEVINE	:	
Petitioner-Appellee,	:	
v.	:	ORDER
PATRICIA TORVIK	:	
Respondent-Appellant	:	
and	:	
STEPHANIE TUBBS-JONES	:	
Intervenor-Appellant	:	

BEFORE: GUY and RYAN, Circuit Judges; and CHURCHILL, Senior District Judge.*

In separate filings, the appellants have petitioned for rehearing and moved for an order staying issuance of the mandate pending application to the Supreme Court for a writ of certiorari or, in the alternative, staying issuance of the mandate pending application to the Supreme Court for a stay. The appellee has responded in opposition to the motion for stay of the mandate.

Upon consideration of the petition for rehearing, it is ORDERED denied.

The motion for stay of the mandate is granted conditionally and issuance of the mandate is stayed for 30 days beyond

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* The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

the seven-day period automatically allowed by Fed. R. App. P. 41(a) when a petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/Leonard Green

BEST AVAILABLE COPY

OHIO REVISED CODE § 5122.01 Definitions

(A) "Mental illness" means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life.

(B) "Mentally ill person subject to hospitalization by court order" means a mentally ill person who, because of his illness:

(1) Represents a substantial risk of physical harm to himself as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;

(2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;

(3) Represents a substantial and immediate risk of serious physical impairment or injury to himself as manifested by evidence that he is unable to provide for and is not providing for his basic physical needs because of his mental illness and that appropriate provision for such needs cannot be made immediately available in the community; or

(4) Would benefit from treatment in a hospital for his mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk of substantial rights of others or himself.

OHIO REVISED CODE § 5122.15(H) Full hearing; disposition; mandatory hearing on continued commitment

(H) If, at the end of the first ninety-day period or any subsequent period of continued commitment, there has been no disposition of the case, either by discharge or voluntary admission, the hospital, facility, board, agency, or person shall discharge the patient immediately, unless at least ten days

before the expiration of the period the designee of the attorney general, the attorney the board designates, or the prosecutor files with the court an application for continued commitment. The application of such attorney or the prosecutor shall include a written report containing the diagnosis, prognosis, past treatment, a list of alternative treatment settings and plans, and identification of the treatment setting that is the least restrictive consistent with treatment needs. The attorney the board designates or the prosecutor shall file such written report at least three days prior to the full hearing. A copy of the application and written report shall be provided to the respondent's counsel immediately.

The court shall hold a full hearing on applications for continued commitment at the expiration of the first ninety-day period and at least every two years after the expiration of the first ninety-day period.

Hearings following any application for continued commitment are mandatory and may not be waived.

Upon receipt of a person involuntarily committed under this section, or the person's counsel, made more than one hundred eighty days after the person's last full hearing, mandatory or requested, the court shall hold a full hearing on the person's continued commitment. Upon the application of a person involuntarily committed under this section or section 2945.40 of the Revised Code, supported by an affidavit of a psychiatrist or licensed clinical psychologist, alleging that the person is no longer mentally ill subject to hospitalization by court order, the court for good cause shown may hold a full hearing on the person's continued commitment prior to the expiration of one hundred eighty days after the person's last full hearing. Section 5122.12 of the Revised Code applies to all hearings on continued commitment.

If the court, after a hearing for continued commitment finds clear and convincing evidence that the respondent is a mentally ill person subject to hospitalization by court order,

the court may order continued commitment at places specified at division (C) of this section.

Whenever a hospital, facility, board, agency, or person intends to discharge a person who was found incompetent to stand trial and whose commitment resulted from an affidavit filed pursuant to division (C) of section 2945.38 of the Revised Code, the chief clinical officer of the hospital, board, agency, or facility or the person shall give notice of the discharge to the prosecutor and, when the respondent is committed to a public hospital, to the attorney general at least ten days prior to the date on which the person will be discharged. Whenever a hospital, facility, or person intends to discharge a person who was found not guilty by reason of insanity and whose commitment was pursuant to section 2945.40 of the Revised Code, the chief clinical officer of the hospital or facility or the person shall not discharge the person until he has complied with division (F) of section 2945.40 of the Revised Code.

Respectfully submitted,

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